SOME GUIDELINES ON THE USE OF CONTEMPT POWERS

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TABLE OF CONTENTS

1. **INTRODUCTION** 1

2. **PRINCIPLES FOR JUDICIAL USE OF CONTEMPT POWERS** 3

3. **GUIDELINES ON CONTEMPT** 5
   - (*a*) **Definition of Contempt** 5
   - (b) **Jurisdiction** 6
   - (c) **Classification of Contempt** 7
     - (i) Contempt in the Face of the Court 7
     - (ii) Contempt not in the Face of the Court 8
     - (iii) Civil Contempt 10
     - (iv) Criminal Contempt 12
     - (v) Criminal Contempt in Civil Proceedings 14
   - (*d*) **The Distinction between Contempt *in facie* and Contempt *ex facie*** 14
   - (e) **Commencement of Proceedings** 16
   - (f) **The Nature of the Summary Procedure in Contempt** 17
   - (g) **Those Who May Bring Proceedings** 21
   - (h) **Statutory Courts, and Courts and Tribunals of Inferior Jurisdiction** 22
   - (i) ***Mens Rea*** 25
   - (j) **The Defence of Truth** 27
   - (k) **Contempt and the Charter** 28
     - (i) The Right to Know Specifically what is Charged 29
     - (ii) The Right to Call Witnesses 29
     - (iii) The Right to be Presumed Innocent 29
     - (iv) The Show Cause Procedure 30
     - (v) The Right to Trial by Jury 30
   - (l) **The Involvement of the Judge** 31
   - (m) **The State of Mind of the Judge** 33
   - (n) **The Trial or Hearing of an Alleged Contemnor** 33
   - (o) **Procedural Guidelines for Contempt in the Face of the Court** 35
   - (p) **Procedural Guidelines for Contempt not in the Face of the Court** 38
   - (q) **Sentencing for Contempt** 40

APPENDIX A - QUESTIONABLE USES OF CONTEMPT POWERS 45

ENDNOTES 49

SOME GUIDELINES ON THE USE OF CONTEMPT POWERS

1. INTRODUCTION

The Canadian Judicial Council recognizes that there has been, from time to time, some public criticism of the existence and use of judges' powers in relation to contempt of court even though many judges have never found it necessary to use them to maintain order in their courtroom. Indeed, some judges believe that this power, and the potential for its use in proper circumstances, is one of the principal reasons why Canadian judicial proceedings are generally conducted with dignity and efficiency.

In addition, the inherent jurisdiction of the courts to deal with out of court contempts that interfere with the proper administration of justice, and the powers of the courts to enforce their orders, may have a general salutary influence upon the maintenance of the Rule of Law. From time to time, however, courts may have used their contempt powers unwisely. Appendix A contains some examples of cases where contempt powers may not have been used with sufficient caution.

There is also the more serious question whether the law of contempt conforms with the *Canadian Charter of Rights and Freedoms*. This issue is dealt with below in section 3(*k*) "Contempt and the Charter" where we reach the view that, properly applied, the current law of contempt is indeed consistent with the *Charter*.

With these considerations in mind, Council requested its Committee on the Administration of Justice to undertake a study of the law of contempt and to prepare proposals or guidelines for the management of contempt powers in order to assist judges, promote uniformity, and avoid abuse. The first draft of these guidelines was distributed in November 1986 to the judiciary in the form of a Working Paper. Thereafter, revised versions of this document were distributed to the judiciary in 1992, 1996 and 2001.

Before turning to our analysis of the law and a Statement of Guidelines, we wish to make a few preliminary observations:

(1) Contempt may arise in an infinite variety of circumstances and it is difficult to draft proposals that cover every eventuality. We do not pretend to have covered every question that may arise.

(2) Our assessment of the present situation in Canada is that situations where contempt powers may be employed fall into categories more or less as follows:

(a) cases where something occurs suddenly in the heat of battle and a judge must act decisively and summarily in order to preserve the authority and dignity of the court and the integrity of its process. Failure to act swiftly and decisively in such circumstances may be harmful to the proper administration of justice. Those who interfere with a court's

process must be dealt with fairly, but promptly. Otherwise, the public may lose respect for the judicial process.

(b) cases where something happens out of court, such as a publication *sub judice*, public disobedience of a court order or conduct that is designed to or may impede access to the courts. In such cases there may be a need to act immediately.

(c) cases that fall between the two extremes, such as where a witness will not be sworn or answer questions, a lawyer continually disobeys proper judicial directions or a party to litigation wilfully refuses to comply with the Rules of Court.

In all of these cases, judges must act fairly and judicially. Both the authority of the court and the rights of alleged contemnors must be respected. In addition, the judge must, in fairness to the litigants, get on with the case.

Our assessment is that these considerations are being given due attention under the present law, subject only to occasional missteps, and that a proper understanding of the history of the law of contempt and a proper judicial approach will further reduce the risk of injustice. There are surprisingly few contempt cases in Canada, largely because judges do not overreact to provocative situations. Thus, we also think the examples of unwise use of contempt powers described in Appendix A are exceptions to the general rule. Certainly the occasions when judges have overlooked provocative and contumacious conduct, or addressed them through more informal measures, far outnumber the cases where judges have erred in the exercise of their contempt powers. With proper guidelines, we think the risk of abuse in all courts can be virtually eliminated.

(3) It was decided in *R.* v. *Kopyto*[1] that, at least for Ontario, the *Charter* has effectively abolished the former common law offence of scandalizing a court or judge in many of its aspects. Apart from "scandalizing", we think the *Charter* and the proper judicial use of contempt powers are entirely compatible, provided such cases are handled with fairness once the authority of the court has been preserved by decisive action.

We do not think decisive action, even if it requires an alleged contemnor to be taken immediately into custody, necessarily offends against the *Charter*. After all, suspects are often arrested on the spot. It must be remembered that sometimes a judge, court staff, jury, counsel and witnesses are all waiting to proceed and great inconvenience may result if, for example, a witness refuses to be sworn or to give evidence. The court may have to act before counsel for the witness is available. It will, however, seldom be necessary to proceed with the actual trial or hearing of an alleged contempt if the contemnor wishes an adjournment in or out of custody for the purpose of retaining counsel or for any other valid reason.

Accordingly, it is our opinion that the current legal regime with respect to contempt proceedings is generally consistent with *Charter* values and protections. Openness and fairness are, of course, the touchstones of the legal rights sections of the *Charter*. These touchstones are not, however, alien to the current contempt procedures. Although contempt situations are varied in nature and context, the current procedures allow for judicial responses which preserve, to the greatest extent possible, the values protected in the *Charter*. Furthermore, it should not be forgotten that the legal rights protected in the *Charter* are not absolute. They are qualified by the "reasonable limits" component of s. 1 of the *Charter*. Accordingly, in those rare cases where there might appear to be a tension between some of the substantive rights in the *Charter* and the actual conduct of a particular contempt proceeding, that tension diminishes significantly when proper regard is given to s. 1.

2. PRINCIPLES FOR JUDICIAL USE OF CONTEMPT POWERS[2]

(1) Contempt of court is the mechanism which the law provides for the protection of the authority of the court from improper interference.

(2) Contempt of court powers do not exist for the protection of the personal dignity, honour or reputation of the judges, only for courts and judges as judges.

(3) Contempt of court is part of a court's inherent jurisdiction and, as it is not precisely prescribed or enacted, should be exercised with scrupulous care and only when the circumstances are clear and beyond reasonable doubt.

(4) Contempt of court can be:

(a) in the face of the court, *i.e.* actually in court or in the cognizance of the court; or

(b) out of court;

and, either form of contempt can be:

(c) civil contempt by a breach of the Rules of Court, disobedience of a court order or other misconduct in a private matter causing a private injury or wrong; or

(d) criminal contempt by any private or public conduct that interferes with a court's process or seriously threatens the proper administration of justice.

(5) Civil contempt is governed in the context of an existing proceeding according to the Rules of Court.

(6) Criminal contempt is governed by summary process fixed by the court to meet the exigencies of the situation. This process is not governed by the Rules of Court.

(7) In trying contempt summarily, the judge can act upon his or her personal knowledge regarding any matter of which the court has cognizance, but he or she must otherwise act upon evidence.

(8) Judges should be quick to identify and deal with abuse or misconduct in some way, but slow to commence contempt proceedings. The court's jurisdiction should be exercised not on personal grounds but only to preserve the court's process and authority.

(9) Insults and other indignities in court should be dealt with other than by contempt proceedings, unless the conduct is such that the ability of the court to administer justice properly is significantly impaired. Insults against a judge out of court that do not actually interfere with the administration of justice, or are not intended to cause disrepute to a court, are not an offence. This is particularly so with respect to proceedings that have been completed.

(10) Except in exceptional circumstances immediately affecting the proper administration of justice, the preferred course is to leave the initiation and conduct of proceedings for contempt out of court to the parties in litigation or to the Attorney General.

(11) A judge should conduct contempt proceedings calmly and judicially and it is usually preferable to refer any matter to another judge if there is any reasonable perception of bias or prejudgment. A judge should not sit in judgment on his or her own conduct. However, a judge should never hesitate to deal firmly and immediately with misconduct that arises in the course of proceedings, particularly if other parties will be prejudiced by delay or unpunished misconduct.

(12) Even where it is necessary to act immediately to preserve the court's authority, contempt proceedings must be conducted fairly and, in most cases, there will be no reason not to adjourn the actual hearing to a later time when the alleged contemnor may have proper legal representation.

(13) Criticism is not necessarily contempt even though it may be defamatory. Criticism during the course of a trial not calculated to interfere with the course of justice is not contempt. When the case is over, all participants, judges, juries, witnesses, counsel and the law are subject to robust criticism, but no one has the right during the course of proceedings intentionally to interfere with such proceedings or otherwise jeopardize a fair trial.

3. GUIDELINES ON CONTEMPT

(*a*) Definition of Contempt

A succinct and frequently quoted definition of contempt is found in *R.* v. *Gray*,[3] where Lord Russell of Killowen, C.J. offered the following:

> Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done, or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court is a contempt of Court.

Contempt arises in many ways. It may be an angry outburst[4], a contemptuous gesture[5], a professional indiscretion[6], a refusal to be sworn or answer a question[7], a deliberate or accidental publication of a statement *sub judice*[8], an interference with proceedings or a witness,[9] a breach of a court order,[10] an attempt to obstruct the administration of justice[11], a deliberate attack upon the integrity of a court or a judge that interferes with proceedings,[12] or some other form of conduct not now foreseeable. Each form of contempt presents special problems that must be assessed carefully.

Generally speaking, contempt falls into four main legal categories:

(1) interfering with judicial proceedings including publications *sub judice*;
(2) improper criticism of a court or judge that interferes with proceedings *etc.*;
(3) disobedience of orders or judgments; and
(4) a residual category relating to obstruction of a court process or officers (as described in *B.C.G.E.U.* v. *A.G. of B.C.*).

In *B.C.G.E.U.* v. *A.G. of B.C.*, Dickson, C.J.C., speaking for the Court on this point said[13]

> In some instances the phrase "contempt of court" may be thought to be unfortunate because, as in the present case, it does not posit any particular aversion, abhorrence or disdain of the judicial system. In a legal context the phrase is much broader than the common meaning of "contempt" might suggest and embraces "where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice or show disrespect to the court's authority", "interfering with the business of the court on the part of a person who has no right to do so", "obstructing or attempting to obstruct the officer of the Court on their way to their duties" - see *Jowitt's Dictionary of English Law*, vol. 1, 2nd ed., at p. 441.

Clearly, contempt is not a personal matter:

> "Contempt of Court" is well known in the vocabulary of the law. It is also well known that it is not a phrase to be taken literally in any sense of being concerned with protection of the personal dignity of the Judge or the honour of the Court. It is rather a sanction to serve the administration of justice in the public interest...[14]

(*b*) Jurisdiction

The law of contempt derives from the common law and has developed case by case within the inherent jurisdiction of a superior court. It has been said that the courts of justice exist for the benefit of the people[15] and that, for this reason, the authority of the court must be protected from unauthorized interference.[16] The law of contempt is the effective mechanism the common law provides for securing this objective.[17]

An exhaustive review of most of the cases up to 1967 in Great Britain, Canada and the U.S.A. on this issue is found in the judgment of Tremblay, C.J.Q. in *Attorney General of Québec* v. *Hébert*.[18]

The basic principle has been stated by Sir Jack Jacobs in "The Inherent Jurisdiction of the Court":

> On what basis did the superior courts exercise their powers to punish for contempt and to prevent abuse of process by summary proceedings instead of by the ordinary course of trial and verdict? The answer is, that the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". This description has been criticised as being "metaphysical", but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.[19]

This principle was recently restated by the Supreme Court of Canada in *R.* v. *Vermette*:

> The power to deal with contempt as part of the inherent and essential jurisdiction of the courts has existed, it is said, as long as the courts themselves (see Fox, *The History of Contempt of Court* (London, 1972), p. 1). This power was necessary, and remains so, to enable the orderly conduct of the court's business and to prevent interference with the court's proceedings.[20]

Applying this reasoning, the Supreme Court has rejected the view that s. 486(5) of the *Criminal Code* restricts or limits a superior court's inherent power to punish for contempt. In *R.* v. *Publications Photo-Police Incorporé*,[21] Kaufman J.A. of the Québec Court of Appeal held that Parliament, in enacting s. 486(5), which had the effect of limiting the penalty for certain kinds of contempt, had not left intact the Superior Court's inherent power to punish for contempt. On appeal,[22] the Supreme Court rejected this view.

The common law jurisdiction in criminal matters is preserved by s. 9 of the *Code*, which prevents any conviction for offences at common law, but also states:

> ... nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the 1st day of April 1955, to impose punishment for contempt of court.

The common law jurisdiction of a superior court in contempt is a part of the inherent jurisdiction of the court and cannot be abridged or abolished except by a constitutional amendment.[23]

(*c*) Classification of Contempt

Contempt can be either in the face of the court (*in facie*), or not in the face of the court (*ex facie*), and it can be criminal or civil.

(i) *Contempt in the Face of the Court*

A contempt in the face of the court occurs in court or within the cognizance of the court. This was described by Lord Denning, M.R. in *Balogh* v. *St. Albans Crown Court* as follows:

> *Blackstone* in his *Commentaries*, 16th ed. (1825), Book IV, p. 286, said: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges." In *Oswald on Contempt*, 3rd ed. (1910), p. 23 it is said: "Upon contempt in the face of the court an order for committal was made instanter" and not on motion. But I find nothing

> to tell us what is meant by "committed in the face of the court." It has never been defined. Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts for which a judge of his own motion could punish a man *on the spot*. So "contempt in the face of the court" is the same thing as "contempt which the court can punish of its own motion." It really means "contempt in the cognisance of the court."[24]

In the same case, Lord Denning reviewed a number of cases[25] and mentions, as instances of contempt in the face of the court, throwing a missile at the judge, disrupting a trial, refusing to answer a proper question, distributing leaflets in the public gallery inciting people to picket the Old Bailey (even though the distributor was not seen by the judge) threatening a witness away from the court house after she had given her evidence, and an employer threatening to dismiss an employee if he responded to a summons to attend court for jury duty.

The examples given by Lord Denning must be viewed with caution in light of *Vermette*. There, the accused, who had just pleaded guilty, followed the complainant into an elevator in the courthouse and threatened her with severe physical violence. This was found to be contempt not in the face of the court. It may be that such conduct out of the presence of a judge could still be contempt in the cognizance of the court if witnessed by an officer of the court, but the safer course is to treat any conduct not actually witnessed by the judge as a contempt out of the face of the court. In *B.C.G.E.U.* v. *A.G. of B.C.*,[26] *Balogh* was cited[27] by Dickson, C.J.C. and picketing outside the court house actually observed by the Chief Justice of the B.C. Supreme Court was found to be contempt in the face of the court.

An unusual use of the power to cite for contempt *in facie* can be seen in *R. v. Peel Regional Police*,[28] in which the Court required the defendants to show cause why they should not be found in contempt for their failure to produce prisoners to courtrooms on a timely basis. In a lengthy judgment, reviewing the law and procedure relating to contempt in the face of the Court, Justice Hill concluded that, in light of increased resources being devoted to prisoner delivery and other improvements introduced after the citation for contempt, the act of contempt had been terminated.

(ii) *Contempt not in the Face of the Court*

Most conduct committed out of the face of the court which is "calculated" to interfere with the proper administration of justice is a contempt. This could include an attack on the integrity or impartiality of a judge if it interferes with or prejudices those proceedings, a publication *sub judice*, a wilful breach of a court order, interference with a witness, counsel or juror, counselling perjury, fabricating evidence, *etc.*

A thorough discussion of the *sub judice* rule can be found in the reasons of Berger J. in *Alberta (Attorney-General)* v. *Interwest Publications Ltd.*[29] The elements of the offence of contempt by publication *sub judice* that must be proved against the defendant were summarized by Perras J. in *R.* v. *Bowes Publishers Ltd.* as follows:

1. the identity of the respondents as the ones responsible for the publication;
2. that it was the activity or conduct of the respondents that brought about the publication; and
3. that the respondents intentionally published the articles and at the time of publication objectively ought to have foreseen that the articles posed a real risk of prejudice to a fair trial for [the accused].[30]

The risk of prejudice to a fair trial must be real, serious or substantial.[31] As such, it must be "more than trifling or trivial but less than a certainty."[32] Perras J. also held that the fact that the offensive material published by the defendant (the accused's criminal record) was provided by the Crown did not entitle the defendant to rely on a defence of officially induced error or mistake of law.[33]

Contempt *sub judice* can also result from publishing potentially prejudicial information while the jury is deliberating. A Court can extend the scope and duration of the publication ban in s. 648(1) of the Code, which applies to evidence led at a *voir dire*.[34] Where the publication is based on sources other than *voir dire* evidence, the question will be, as it is for all forms of *sub judice* contempt, whether a fair trial has been put at risk. The assessment of risk must take account of the fact that, during its deliberations, the jury should be shielded from media coverage of the case. As Henderson J. stated recently:

> I conclude that, in the usual case, where an adequately staffed sheriff's department is available to enforce the isolation that sequestration demands and where there are no exceptional and unusual circumstances, publishing prejudicial material after sequestration but before verdict does not present a real and substantial risk of trial unfairness.[35]

The test for determining *sub judice* contempt remains the same, even in light of the decision of the Supreme Court of Canada in *Dagenais v. CBC*.[36] That case deals with the issuance of publication bans and does not appear to alter the common law of *sub judice* contempt.[37]

Several decisions have dealt with the question of whether the fact that a court order was defective provides a defence against a finding of contempt for violating the order. It would seem from the decisions outlined below that the law in Canada is firm on this question: a person can be held in contempt for failing to follow an order, whether the order is good or bad, until the order is set aside.[38] Further, the general rule is "that where a person disobeys an order of the court, the court will not entertain any application by that person until he or she obeys the order."[39] However, dismissal of a contemnor's civil action may in some circumstances be an excessive sanction.[40]

The statements of Southin J.A. in *Everywoman's Health Centre Society* v. *Bridges*[41] seem to suggest that it is of no use to an alleged contemnor to raise in his or her defence that the court order which was violated applied unconstitutional principles of common law, or principles inconsistent with the *Charter*.

In *B.C. (A.G.)* v. *Mount Currie*,[42] MacDonald J. held that the validity of a court order could not be raised or questioned during contempt proceedings for a breach of that order. Furthermore, the question of whether the Court had jurisdiction to make the order in the first place could not be raised at the contempt proceedings, for this would amount to a collateral attack on the order itself, contrary to the doctrine of collateral attack.

In *Canada (Human Rights Commission)* v. *Taylor*,[43] McLachlin J. expressed the view that the ultimate invalidity of an order because of its unconstitutionality is no defence to an allegation that a party acted in contempt of it. Even an invalid court order must be followed until it is set aside by legal process. However, the wisdom or validity of the initial decree is a relevant consideration in determining the appropriate sanction. Furthermore, it would seem that past contempt is not expunged by the subsequent expiry of an order.

However, in *M.G.E.A.* v. *Health Services Commission*,[44] the Manitoba Court of Appeal held that an alleged contemnor could not be found in contempt when the judgment he was alleged to have failed to follow was not one which could be entered as a court judgment and enforced as such.[45] Similarly, if the initial order was vague, the alleged contemnor is entitled to the benefit of a doubt.[46]

It should also be noted that in *United Nurses of Alberta* v. *Alberta (Attorney General)*,[47] McLachlin J., speaking for the majority of the S.C.C., held that unions may be held liable for contempt. Unions have legal status for collective bargaining purposes, and so "[i]f they exercise their rights unlawfully, they may be made to answer to the court by all the remedies available to the court, including prosecution for the common law offence of criminal contempt."

(iii) *Civil Contempt*

Civil contempt usually constitutes a breach of the Rules of Court or conduct out of the face of the court. A typical case is when a party fails to deliver documents when ordered to do so, or when a person bound by an order of a court requiring him or her to do something or refrain from doing something in a private matter, disobeys that order. This gives rise to a private injury or wrong at the suit of another party to the litigation and a civil contempt of the court, but causing such private injury is not likely to be a criminal contempt unless it is deliberately repeated or otherwise indicates an intention to defy the court's authority.

It is not necessary that the alleged contemnor be found in breach of a specific term in a court order. It is sufficient if his or her actions "are designed to obstruct the course of justice by thwarting or attempting to thwart a court order."[48] As such, contempt can arise other than through

direct disobedience of a court order - for example, through interference with the administration of property protected by a court-appointed receiver.[49]

Where a court has issued an injunction in the course of civil proceedings, persons who are not parties to the suit are "if not technically *bound by the order, bound to obey the order*."[50] As such, they may be cited for contempt for breach of the order. Accordingly, "since persons other than named parties may be affected by the order, and be held in contempt for violating it, it makes good sense to use language [in the order] which alerts those people to that risk."[51]

In family law matters, particular restraint should be used in resorting to powers of contempt. They should be employed only where a party has intentionally breached a court order or has done so without lawful excuse. As Veit J. stated in *Salloum* v. *Salloum*, "restraint is appropriate given the twin objectives of protecting both the best interests of the children and the administration of justice....Children are better off if their parents are not in jail or paying fines."[52] Still, a jail sentence may be appropriate in family law matters where it is in the best interests of the family and the public.[53]

Even civil contempt is, at least in some respects, criminal or quasi-criminal. The contemnor may be sanctioned by a fine or term of imprisonment. As such, the elements of civil contempt must be proved beyond a reasonable doubt.[54] In addition, the person cited for contempt cannot be compelled to testify.[55] In some cases, it may not be necessary even to decide whether the conduct of the contemnor amounts to civil or criminal contempt.[56]

In *Manolescu* v. *Manolescu*,[57] Huddart J. of the British Columbia Supreme Court, held that a husband who had consistently refused or neglected to pay support and arrears, and who had deliberately disobeyed court orders and misled the court, is guilty of civil but not criminal contempt. The conduct of the husband affected only his family and did not bring the administration of justice into disrepute or interfere with the course of justice. However, because his civil contempt was of the most serious sort, he was sentenced to 90 days in jail.

In *Stupple* v. *Quinn*,[58] it was held by McEachern C.J.B.C. that "[p]roceedings founded upon allegations of contempt amounting at most to civil contempt must be pursued *strictissimi juris*." He held that in the absence of notice and a full examination of the issue, a finding of contempt should not be made.

In Québec, s. 50 of the *Code of Civil Procedure* codifies civil contempt, *inter alia*, by providing:

> Anyone is guilty of contempt of court who disobeys any process or order of the court or of a judge thereof, or who acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the court.

Section 51 provides for a fine of up to $5,000 or imprisonment not exceeding one year for violations of s. 50.

(iv) *Criminal Contempt*

On the other hand, any person who publicly disobeys a court order or assists others to do so, or anyone, bound by an order or not, who publicly attempts to interfere in any way with the due course of justice, is guilty of a criminal contempt.[59]

This distinction between civil and criminal contempt, approved by the Supreme Court of Canada in *Poje*,[60] is stated in *Halsbury*[61] as follows:

> Contempt of court is either (1) criminal contempt, consisting of words or acts obstructing or intending to obstruct the administration of justice, or (2) contempt in procedure, consisting of disobedience to the judgments, orders or other process of the court, and involving private injury.

In *Poje*, Kellock, J. furnished the following distinction between civil and criminal contempt. He said:

> There are many statements in the books that contempt proceedings for breach of an injunction are civil process, but it is obvious that conduct which is a violation of an injunction may, in addition to its civil aspect, possess all the features of criminal contempt of court. In case of a breach of a purely civil nature, the requirements of the situation from the standpoint of enforcement of the rights of the opposite party constitute the criterion upon which the court acts. But a punitive sentence is called for where the act of violation has passed beyond the realm of the purely civil.[62]

Kellock, J. also quoted[63] with approval a statement found in *Oswald*, 3rd. ed.,[64] as follows:

> And, generally, the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court, or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involves a *public* injury or offence, it is criminal in its nature, and the proper remedy is committal - but where the contempt involves a private injury only it is not criminal in its nature.

In *United Nurses of Alberta* v. *Alberta (Attorney General)*,[65] McLachlin J. refers to the distinction between civil and criminal contempt drawn in *Poje*, and offers the following elaboration regarding the public nature of criminal contempt:

> A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal.[66]

She goes on to say:

> The gravamen of the offence [of criminal contempt] is not actual or threatened injury to persons or property; other offences deal with those evils. The gravamen of the offence is rather the open, continuous and flagrant violation of a Court order without regard for the effect that may have on the respect accorded to edicts of the Court.[67]

Further:

> While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, ... rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.[68]

Thus, an outburst in court, being calculated to interfere with the ordinary course of justice, or refusing to be sworn or to testify is a criminal contempt. A public disobedience of an injunction is a classic criminal contempt[69]. A failure to pay a judgment or to deliver a chattel ordered to be delivered, however, is probably a private contempt which is not criminal in the first instance, but may become criminal if there is a continuing wilful refusal to obey a court order.

In *Everywoman's Health Centre Society* v. *Bridges*,[70] McEachern C.J.B.C. notes that the determination of whether a contempt arising in a civil proceeding is criminal or civil contempt is a determination made by the court in the course of the proceeding. The nature of the proceeding (criminal or civil) by which the alleged contemnor is brought before the court is not relevant.

This distinction is very important because it is only criminal contempt which may be dealt with summarily and, possibly, without further evidence if it occurs in the face of the court. Where the contempt occurs not in the face of the court, proceedings will commence on notice. Civil contempt should be dealt with in accordance with the usual Rules of Court. These Rules do not apply to criminal contempt.[71]

In any case, the usual fairness safeguards must be assured to any alleged contemnor at the hearing where guilt or innocence is determined. These safeguards will be more fully discussed later. Even when someone is taken summarily into custody, he or she should be considered for interim judicial release, and he or she must always be treated fairly.

(v) *Criminal Contempt in Civil Proceedings*

In many cases arising out of disobedience of an injunction, the application for contempt will be brought in the civil proceedings, but the court may nevertheless make a finding of criminal contempt. This is what happened in *Poje* and in many other cases.[72]

As it is the nature of the impugned conduct that determines whether a contempt is civil or criminal - a finding that can only be made after the trial or hearing - it is not necessary that any judicial declaration be made converting the proceedings from civil to criminal, or for separate proceedings to be commenced. But the alleged contemnors must be given notice that they face criminal consequences before the hearing begins. The standard form of notice initiating contempt proceedings is usually a Writ of Attachment which gives clear notice of the nature of the proceedings.[73]

It is usual, whenever the public interest in the administration of justice is involved, for the Attorney General to appoint counsel to conduct the contempt proceedings, particularly if the aggrieved party is unwilling or unable to do so.

(*d*) The Distinction between Contempt *in facie* and Contempt *ex facie*

Every court of record has jurisdiction to deal summarily and immediately with any contempt committed in the face of the court without other evidence than the facts known personally by the presiding judge. This includes the power to punish by fine, imprisonment or expulsion from court.

In *Morris* v. *Crown Office*, Lord Denning, M.R. put it this way:

> The phrase "contempt in the face of the court" has a quaint old-fashioned ring about it: but the importance of it, is this: of all places where law and order must be maintained, it is here, in these courts. The course of Justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power -a power instantly to imprison a person without a trial -but it is a necessary power. So necessary indeed that until recently the judges exercised it without any appeal.[74]

When a contempt occurs in the face of the court and the facts are all known personally by the judge, or they are within the cognizance of the court, and the alleged contemnor is in court, a judge, without hearing further evidence but after giving the alleged contemnor an opportunity to make an explanation, call evidence or make a submission, may, in a proper case, proceed instantly and summarily to make a finding of guilt and sentence the contemnor appropriately. This is a proper course to follow if immediate action is necessary to preserve order or the authority of the court.

If it is possible, however, the better procedure may be to have the alleged contemnor taken into custody if it is necessary and then decide later that day, and certainly no later than the next day, how and where to proceed. In the meantime, the alleged contemnor should be given an opportunity to retain and instruct counsel. In either case, of course, the proceedings must be conducted fairly.

Whether the court proceeds immediately or at a later time or date depends upon all the circumstances. Generally speaking, an alleged contemnor should be granted an adjournment if he or she requests it and the proper administration of justice will not be harmed. On the other hand, if a person disturbs proceedings either by calling a judge an unpleasant name in court or by some other means, and witnesses are standing by waiting to give their evidence, *etc.*, it may be necessary to deal with the contempt "on the spot". This, however, would be the exceptional case.[75]

If the contempt occurs in court but the alleged contemnor has left, a judge may in a serious case direct that he or she be brought before the court, in custody if necessary, and if all the facts are not known to the judge personally, he or she should conduct a hearing in the presence of the alleged contemnor by taking evidence on issues of fact not known to the court and reach a conclusion in that way even though it may be necessary to adjourn the case at bar so to do. This would only be advisable if it is necessary to deal immediately with a contempt in order to ensure the court's business may properly be carried on.[76] The preferable course, if possible, is to conduct hearings related to alleged contempts after the completion of the case at bar, although it is sometimes necessary for the proceedings to be initiated immediately in order to make repetition unlikely.

Contempt not in the face of the court, on the other hand, may not be determined "on the spot" without evidence. Instead, the alleged contemnor must be brought before the court or be given notice to attend at a specified time and place, and he or she must be tried in accordance with the principles of fairness as hereafter discussed.

A superior court may also enjoin contumacious conduct by the more lenient remedy of an injunction.[77]

At common law, there was no appeal against a finding of criminal contempt. This was amended by the *Criminal Code* (now s. 10) in 1953. This section provided an appeal against sentence imposed summarily for contempt in the face of the court and against conviction and sentence for contempt not in the face of the court. By a further amendment in 1972, a right of appeal was furnished against conviction for contempt in the face of the court.

The distinction between contempt in the face of the court and out of the face of the court is also important in considering the management of contempt alleged in respect of courts or tribunals of inferior jurisdiction. That question is more fully discussed below in section (*h*) "Statutory Courts, and Courts and Tribunals of Inferior Jurisdiction", but it may briefly be stated now that only superior courts, or those given specific legislative authority, have jurisdiction to deal with contempt out of the face of the court.

(*e*) Commencement of Proceedings

In addition to the court's authority to deal summarily with contempt in the face of the court, or its jurisdiction on notice in the case of contempt not in the face of the court, anyone can initiate proceedings by information under the *Criminal Code* for any substantive offence such as perjury (s. 131) or disobeying a court order (s. 127(1)). These proceedings do not oust the summary jurisdiction of a superior court to deal with contempt as circumstances may require.[78] See also *R.* v. *Publications Photo-Police Incorporé*,[79] in which the Supreme Court rejects the view that *Criminal Code* provisions setting out penalties for contempt taint the inherent jurisdiction of superior courts to punish for contempt.

At common law, there was also a procedure leading to punishment for contempt by Information or Indictment. It has been said that this procedure has not been used in England since 1823.[80]

In Canada there has been a difference of opinion about the preservation of the indictment for contempt. This question has been resolved by the Supreme Court of Canada in *Vermette*,[81] where it was decided that the *Criminal Code* (now s. 9) preserves the common law indictment for contempt.

In *Attorney General of Québec* v. *Hébert*, some members of the Court of Appeal suggested the summary process was not appropriate in that case. Owen, J.A. said:

> ...I cannot see that there was any justification for proceeding against Hébert by summary process instead of following the general rule and proceeding against him by ordinary process.[82]

Hugessen, A.C.J.Q. in *R.* v. *Ouellet*[83] thought this mention of "ordinary process" probably referred not to indictment but rather to a summary trial or hearing with fairness safeguards which were noticeably absent in *Hébert*. Hugessen, A.C.J.Q. also doubted the existence of ancient remedies in Canada because criminal Informations (not our present initiating "Information") were abolished by *Code* s. 576(2), and *Code* s. 9(1) abolishes common law offences except, of course, whatever is preserved by the proviso to *Code* s. 9 which he thought referred only to the court's historic summary jurisdiction.

Until *Vermette*, proceedings by indictment for contempt had fallen into desuetude in Canada as in England. The preferred procedure for many years has been an application by Notice of Motion in an existing cause, or by Petition or some other form of originating proceeding, but not by indictment or the commencement of an action. This is because:

> The law has armed the High Court of Justice with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice.[84]

and because:

> It is said with respect to them [inferior courts], as has been said with respect to the present case, that there is a remedy by criminal information or indictment. The latter remedy is unsatisfactory on account of the necessary delay, though it has been made use of [and here the learned Judge cites a case]....Criminal information is cumbrous, and is also liable to great delay. It has, no doubt, been occasionally resorted to [further cases are cited]....In England no case of a criminal information for a matter of this kind is to be found in the books since *Rex* v. *Williams*, 2 L.J. (O.S.) K.B. 30, in 1823.[85]

This question was discussed by McRuer, C.J.H.C. in an article in which he said:

> In every case the Attorney General may move where anything has taken place which may tend to interfere with the fair administration of justice. The Attorney General is the King's Attorney General and his responsibility is the same for the enforcement of this branch of the criminal law as any other. Contempt of court is an indictable offence and proceedings may be taken by way of indictment, *but in every case of which I have any knowledge the summary power of the judge has been invoked.*[86] (emphasis added)

Thus, while proceeding by indictment is lawful for contempt, the preferred procedure is to invoke the court's inherent summary process by Petition or Notice of Motion.

(f) The Nature of the Summary Procedure in Contempt

The exact procedure for the summary determination of a question of contempt is nowhere stated. It may vary from case to case. Thus, in *Tilco Plastics Ltd.* v. *Skurjat et al.*,[87] Gale, C.J.H.C., as he then was, said:

> Before leaving this topic, however, it must be emphasized that there is some confusion as to the meaning of a "summary" exercise of the power to punish for contempt. There are many cases which caution that the power is to be used scrupulously and only in serious circumstances. For example,

> see *R.* v. *Gray*, [1900] 2 K.B. 36 at p. 41, *per* Lord Russell of Killowen, C.J.; *R.* v. *Davies*, [1906] 1 K.B. 32 at p. 41, *per* Wills, J.; *R.* v. *Evening Standard Co. Ltd.*, [1954] 1 Q.B. 578 at p. 584, *per* Goddard, L.C.J.; *Re Lincoln Election* (1878), 2 O.A.R. 353 at p. 368, *per* Moss, C.J. It must be borne in mind, however, that there are several degrees of "summary process" and that the procedure adopted in this instance was summary only in the sense that the matter was brought to this Court by way of originating notice of motion, rather than indictment, and that the respondents did not have the right to elect trial by jury. All other rights, including the right to cross-examine, the right to call witnesses and the right to call no defence, as in any other trial, were accorded the respondents. This is quite different from such cases as the *A.G. Qué.* v. *Hébert* (a decision not yet reported) [see now [1966] Que. Q.B. 197], in which the applicant obtained a rule *nisi* commanding the alleged contemnor to appear and to show cause why he should not be committed for contempt. On the return of the rule the respondent was refused the right to call witnesses. His conviction was subsequently quashed by the Quebec Court of Queen's Bench, Appeal Side, the majority of the Judges taking issue with the summary procedure used. The case is distinguishable from the one at hand, for there the alleged contempt was contained in a book published long after the exercise of the judicial discretion which was criticized.

What is significant about the summary procedure is that the court has a discretion to determine how to proceed, and the court is not bound by time limits or other procedural rules except, of course, the principles of fairness.

The purpose for the summary process was described by Owen, J.A. in *R.* v. *Hébert*[88] as follows:

> It can be understood how and why this procedure by summary process involving the power to punish contempt of Court expeditiously came into being. If a person in a Court-room defies the Court or otherwise holds it in contempt, the Court, to maintain its authority, is obliged to exercise it promptly. Similarly if during the course of a trial acts are done or words are spoken or written, not in the face of the Court, which interfere with or obstruct the course of justice in respect to that trial, then again the Court must act promptly and put an end to such interference or obstruction.

Sir Jack Jacobs describes the summary process as follows:

> Whatever coercive powers the court may exercise under its inherent jurisdiction, it proceeds to do so summarily. What then is the meaning of "summary process?" It means the exercise of the powers of the court to punish

> or to terminate proceedings without a trial, *i.e.*, without hearing the evidence of witnesses examined orally and in open court. It does not mean that the court can be capricious, arbitrary or irregular, or can proceed against the offender or the party affected without his having due opportunity of being heard; but summary process does mean that the court adopts a method of procedure which is different from the ordinary normal trial procedure. Summary process and trial are thus two opposite modes of procedure, in the one case the court exercises its powers without a trial, in the other case the court proceeds by way of a normal trial to verdict or judgment on the issues raised by the litigant parties. The true contrast therefore is between the ordinary jurisdiction of the court to proceed to a trial and verdict or judgment, and the inherent jurisdiction of the court to proceed by summary process.[89]

The Supreme Court of Canada has endorsed the following statement of Lord Denning in *Balogh* v. *Crown Court at St. Albans*:[90]

> *This power of summary conviction is a great power*, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge and to ensure a fair trial. *It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately - so as to maintain the authority of the court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced - and the like. It is, of course to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt....*But properly exercised, it is a power of the utmost value and importance which should not be curtailed.[91]

Thus, in the case of an outburst in the course of a trial the judge can deal with the question of contempt summarily if the alleged contemnor is in court and the judge knows all the facts.[92] However, the Supreme Court of Canada has now made clear that to "cite" a person for contempt in the face of the court does not mean that the judge should convict and sentence the contemnor immediately. Lamer C.J.C. stated in *R.* v. *K.(B.)*:

> In order to simplify matters, it is my opinion that we should use the notion of citing in contempt not as an expression of a finding of contempt but instead, as a method of providing the accused with notice that he or she has been contemptuous and will be required to show cause why they should not be held in contempt.[93]

In that case a witness refused to testify at a preliminary inquiry and directed abusive and insulting remarks at the presiding judge. The judge instantly found the witness guilty of contempt and imposed on him a six month sentence. The Supreme Court of Canada held that the judge "was

amply justified in initiating the summary contempt procedures."[94] However, the judge was not justified in moving as swiftly as he did. Lamer C.J.C. stated:

> I, however, find no justification for foregoing the usual steps, required by natural justice, of putting the witness on notice that he or she must show cause why they would not be found in contempt of court, followed by an adjournment which need be no longer than that required to offer the witness an opportunity to be advised by counsel and, if he or she chooses, to be represented by counsel. In addition, upon a finding of contempt there should be an opportunity to have representations made as to what would be an appropriate sentence. This was not done and there was no need to forego all of these steps.[95]

Having said this, Lamer C.J.C. acknowledged that there may be exceptional cases "where failure to take one or all of the steps I have outlined above will be justified..."[96] However, this would be subject to the requirements of the *Charter*.[97]

If the contemnor has fled, the judge can issue a warrant for his or her immediate arrest and return to court, at which point he or she can still be dealt with summarily.

If the contempt occurs out of the face of the court, a judge of the court on his or her own motion, or on application by an interested party, may fix the procedure to ensure the attendance of the respondent, or a party having the conduct of the proceedings may simply file and serve a Petition or Notice of Motion requiring the alleged contemnor to appear at a time and place stated. At the hearing the court determines if proper notice has been given or makes further directions. Proper notice generally means personal notice of the motion for contempt.[98] Thus, service at the address for service of the respondent is inadequate,[99] but service on counsel of record may be sufficient if the respondents receive actual notice thereby.[100]

The judge can adjourn the matter until the end of a pending trial, if any, or deal with it immediately as circumstances may require, and the judge can rely upon his or her own knowledge if relevant, or hear evidence or read affidavits or act on a combination of these sources of fact. The important point is that the court is not required to conduct a trial or hearing alleging criminal contempt in accordance with the Rules of Court. There are no pleadings (although there may be affidavits). There may or may not be discovery or cross-examination on affidavits as the court orders. There is no right to trial by jury, and the matter may be resolved expeditiously or in a more formal way as the court considers appropriate. The court is required, of course, to conduct the proceedings fairly, but this would not always require the court to adjourn a matter even for the purposes of obtaining counsel if urgent action is required to preserve the authority of the court.[101]

The summary process and procedural safeguards to be accorded to an accused in contempt proceedings are discussed by Goodridge J., in *Re Smallwood*[102] and Hally J. in *R.* v. *Robinson-Blackmore Printing and Publishing Co.*[103]

(g) Those Who May Bring Proceedings

It was held in *R.* v. *Froese*,[104] that proceedings to punish for contempt may be initiated by the court, by the Attorney General, by any party to proceedings already under way or by any interested party such as a witness or a complainant. In *Choquette* v. *Hébert*,[105] however, it was held that a private member of the bar not directly interested in the matter had no status to commence proceedings for contempt following a publication in the newspaper "La Presse" which allegedly flouted the judicial process.

In *Poje*,[106] there was massive violent disobedience of an injunction. The Plaintiff commenced contempt proceedings but the dispute was then settled and the parties to the litigation sought a discontinuance. To this the court would not agree, thinking that the contempt was too serious to overlook. The court directed that the matter proceed and the Attorney General assumed conduct of the case.

In *Attorney General of Québec* v. *Hébert*,[107] the proceedings were initiated by the Attorney General by Petition as there were no proceedings in which an application could be brought.

In *R.* v. *Ouellet*,[108] the judge who was criticized actually initiated the proceedings and, as the respondent was a federal cabinet minister, the judge thought it inappropriate to leave it to the provincial Attorney General to appoint counsel, so the initiating judge appointed counsel and requested another judge to hear the matter. This appointment of counsel was criticized by Montgomery, J.A. in the Court of Appeal where it was suggested,[109] that some other judge should have appointed counsel.

In *Re B.C.G.E.U.*,[110] the Court issued an injunction forbidding picketing of court houses on its own motion in circumstances where there was urgency, but no proceedings were under way which related directly or indirectly to the alleged contempt. The Attorney General then assumed conduct of the proceedings.

In *R.* v. *Froese*[111] and *R.* v. *Bannerman*,[112] the trial judge refused to take any action, notwithstanding the publication of a serious and prejudicial *sub judice* comment, leaving it instead to counsel for the Crown to bring proceedings for contempt, which was done. The judge expressed some fairly strong views about the impropriety of such publication while dismissing an application for a mistrial. The trial judge accordingly stood the contempt question over until the end of the trial and requested another judge to hear it.

In most cases, it will be the wise course for the judge to leave the initiation of proceedings to the parties or to the Attorney General. Indeed, it may be appropriate, particularly where there is a large number of defendants, for the court to request that the Attorney General take conduct of the proceedings.[113] Still, circumstances may arise where a court should not countenance flagrant disobedience of its orders or its process. The Court would then be justified in acting on its own motion if it becomes necessary so to do in order to maintain the authority of the court and it appears

that no one else will do so. Whether the initiating judge should hear the matter depends upon all the circumstances. This will be discussed below in section (*l*) "The Involvement of the Judge".

(*h*) Statutory Courts, and Courts and Tribunals of Inferior Jurisdiction

Section 484 of the *Criminal Code* provides:

> 484. Every judge or magistrate has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.

Section 484 seems to confer upon all courts of inferior jurisdiction the same power to deal with contempts in the face of the court as superior courts. This seems to restate the common law.[114] At common law, however, courts of inferior jurisdiction and statutory courts did not have authority to deal with contempts not in the face of the court, and it became the duty of superior courts to protect the other courts, usually by the commencement of proceedings in a superior court by the Attorney General.[115]

One common way in which the orders of inferior tribunals and statutory courts are enforced is by legislation providing that such orders can be registered with a superior court, and enforced by means of contempt proceedings (including proceedings for criminal contempt) as if made by the superior court. In *United Nurses of Alberta* v. *Alberta (Attorney General)*,[116] it was decided by the Supreme Court of Canada that such enforcement was constitutional and permissible under Canadian law. Of particular note in this decision is the finding that this sort of enforcement does not constitute the exercise by a provincial tribunal of powers only exercisable by a s. 96 court. In enforcing the order of the inferior tribunal, the superior court is exercising powers within its own jurisdiction. Furthermore, the provincial legislation that provides for the registration of the order with the superior court does not invade the exclusive federal jurisdiction over criminal law - such legislation engages but does not create criminal law.

In *C.B.C. et al.* v. *Cordeau et al.*[117] it was decided that inferior tribunals do not have jurisdiction to punish contempt not in the face of the court. Beetz, J., speaking for the majority, said:

> Accordingly, I think it is fair to conclude that the Anglo-Canadian authorities on the power to punish for contempt committed *ex facie curiae* have been firmly established for more than two hundred years. According to these authorities, this power is enjoyed exclusively by the superior courts.[118]

The decision of the Federal Court of Appeal in *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*[119] would appear to suggest that legislation can confer upon a tribunal the power to punish for contempt committed *ex facie*. Iacobucci C.J. says at 130:

> In order for the tribunal to have the power to punish for contempt committed *ex facie*, it is therefore necessary that there be a statutory provision giving it that power.

He then holds, quoting from the reasons of Dickson J. in *Cordeau*, that any such statutory provisions must be strictly interpreted. In the absence of clear, unambiguous and express language investing a tribunal with broader powers, legislation will be interpreted as conforming to the common law, and under the common law, an inferior court or tribunal can only punish for contempt committed *in facie*.

In *Doz* v. *The Queen*,[120] it was held that inappropriate comments made by counsel after the conviction of his client by a Provincial Court Judge could only be treated in that Court as a contempt by the Provincial Court Judge to whom the remarks were directed and not by another judge of the same court to whom the matter was referred. While there are no reasons explaining this decision, it appears from the dissenting judgment in the Court of Appeal that the contempt should have been dealt with by the trial judge under the jurisdiction conferred by section 484 of the *Criminal Code* to "preserve order" in his court, or by an Information in the Provincial Court or by a Notice of Motion in the Superior Court of the Province.

In *R.* v. *Bunn*,[121] the Manitoba Court of Appeal held that *Doz* should be confined to its facts and that the "long-standing practice" of referring contempts *in facie* that need not be dealt with immediately to another judge of the provincial courts should continue.

Some provinces have attempted to alter the common law in this respect by legislation conferring various forms of jurisdiction in contempt upon other courts. Questions may arise in some other cases, however, whether the legislation confers a full jurisdiction in contempt or just for contempts in the face of the court. For example, in British Columbia, the *Provincial Courts Act* provides that such courts "...may commit for contempt of court". This may refer only to the jurisdiction inferior courts have always had to preserve order in their courtrooms. Beetz, J. mentions this in relation to a Commission of Inquiry in *Cordeau*[122] where he said:

> A provincial legislature may not, without infringing s. 96 of the *British North America Act, 1867*, confer on a tribunal or a court the members of which are not appointed by the Governor General a jurisdiction which in 1867 was reserved to the superior courts.

In that case, Martland and Dickson, JJ. declined to express an opinion on the constitutional question which was probably *obiter*, but six judges concurred in the judgment of Beetz, J.

Section 47(2) of the *Young Offenders Act*[123] provides that the youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person out of the face of a court. This would, *prima facie*, appear to limit the jurisdiction of courts established under s. 96 of

the Constitution. However, MacDonald J. of the Supreme Court of British Columbia held differently in *B.C. (A.G.)* v. *Mount Currie Indian Band*:[124]

> I have concluded that the power of this court to maintain its authority and prevent the obstruction and abuse of its processes by means of contempt proceedings is so fundamental to its function that the federal Parliament cannot deprive it of that power. While there can be no objection to concurrent jurisdiction in the youth court in respect of charges laid under the Criminal Code, it is the word "exclusive" in s. 47(2) of the Act which does not bind this court.
>
> I accept the first alternative proposed by the province in its notice under the *Constitutional Question Act*, namely, that s. 47(2) of the Act must be interpreted so that the words "other court" therein do not apply to this court, a superior court of general jurisdiction whose judges are appointed pursuant to s. 96 of the Constitution Act, 1867.

In *MacMillan Bloedel Ltd.* v. *Simpson*, the question arose whether s. 47(2) of the *YOA* was constitutional. MacEachern C.J.B.C. held that s. 47(2) intruded on one of the "core" or "inherent" powers of a superior court and, as such, was unconstitutional. On appeal, Lamer C.J.C., per majority, agreed with this characterization of the contempt power. He concluded that while it is permissible for Parliament to grant jurisdiction to youth courts over contempts *ex facie*, it cannot deny this jurisdiction to superior courts. Thus, s. 47(2) is unconstitutional to the extent that its grant of jurisdiction is exclusive. Lamer C.J.C. stated:

> In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.[125]

By their enabling legislation, the Federal Court of Canada, most provincial Courts of Appeal and the Supreme Court of Canada are constituted superior courts and, as their judges are appointed by the Governor General in Council, enjoy the same jurisdiction in contempt as the superior courts of original jurisdiction.[126]

(*i*) ***Mens Rea***

Prior to *Kopyto*[127] the law relating to *mens rea* in contempt cases was described in *R.* v. *Perkins*,[128] *R.* v. *Barker*,[129] and *Rivard* v. *Proc. Gen. du Québec*.[130] It was not necessary to establish that the alleged contemnor intended to put himself or herself in contempt, but it had to be shown that he or she knowingly or wilfully or deliberately did some act which was calculated to result in a disturbance or an interference with the judicial process. Thus, in *Perkins,* contempt was found where the accused got drunk just before he was to be a witness in court. While there was an acquittal in *Barker* (for alleged contempt in bringing a tape recorder into court), the Court of Appeal did not disagree with the above statement and the case was disposed of on the question of the accused's honest belief. As the headnote states:

> However, where there may not have been a guilty intent but the behaviour is clearly likely to bring disrespect on the court, or the behaviour is negligently or recklessly such as to inevitably result in disrespect on the court, then such behaviour could constitute contempt.

In *Rivard*, it was stated:

> Appellant intended to and did write and publish respectively the impugned article; that is the intent, the *mens*, required; actual intent to interfere with the course of justice is not required.[131]

Quite a different test is suggested in *Kopyto*, but we think it applies only in those rare cases where "scandalizing" may still be an offence by reason either of interfering with pending proceedings or being so serious as to cause a real, substantial and immediate apprehension of damage to the administration of justice. It is difficult in a brief paper such as this to express completely the various conclusions stated in *Kopyto*. For practical purposes, however, scandalizing by words will rarely be an offence, particularly with regard to completed proceedings. Generally speaking, judges must henceforth be prepared to endure almost any form of out of court criticism. For other classes of cases, the law must be taken to be settled as stated in *B.C.G.E.U.* v. *A.G. of B.C.*.[132]

The test suggested by Cory and Goodman, JJ.A. requires proof beyond reasonable doubt that the accused either intended to cause disrepute to the administration of justice, or was reckless in that connection in spite of reasonable foreseeability of such result and, then, only if such consequences were both imminent and a real and substantial danger to the administration of justice.

Dubin, J.A. (Brooke, J.A. concurring) dissented and concluded that common law contempt does not offend against the *Charter*, but about *mens rea* he said:

> ... [T]he question to be left to the jury is whether the real intention of the person charged was to vilify the administration of justice, destroy public

> confidence therein and to bring it into contempt; or whether the publication, however vigorously worded, was honestly intended to purify the administration of justice by pointing out, with a view to their remedy, errors or defects which the accused honestly believed to exist.[133]

Without referring to *Kopyto*, the Supreme Court of Canada in *B.C.G.E.U.* v. *A.G. of B.C.*, *supra*, said[134] that an intent to bring a court or judge into contempt is *not* an essential element in the offence of contempt, and a number of pre-*Kopyto* authorities are cited. In *R.* v. *Bunn*,[135] the Manitoba Court of Appeal held that a lawyer should not be held in contempt for inadvertent "double-booking."

An example of a post-*Kopyto* finding of contempt for scandalizing the court can be found in *R.* v. *High Sierra Broadcasting et al.*[136] MacDonald J. of the Supreme Court of British Columbia said:

> On the basis of the decision in *Regina* v. *Kopyto* a demand for the resignation of a judge on the grounds of alleged incompetence, even coupled with the term "anarchist" and scurrilous allegations about responsibility for the death of a 14-year old boy is not contempt unless it is calculated to interfere with the administration of justice.

The person who made the allegations was found in contempt because it was held that he made the allegations for the purpose of having a judge removed from hearing a case involving himself and his children. There was, according to the Court, a clear intention to interfere with the administration of justice. By contrast, a reporter and the radio station for which he worked were not found in contempt for broadcasting the same allegations because the Court found they were not aware of either the proceedings or the contemnor's involvement in the proceedings. The Court was "unable to find the requisite intention or wilfully reckless behaviour" necessary to support a finding of criminal contempt for scandalizing the court.

McLachlin J. (for the majority) in the S.C.C. decision of *United Nurses of Alberta* v. *Alberta (Attorney General)*, said the following regarding *mens rea* and criminal contempt:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of

> the court would be brought into contempt. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary *mens rea* would not be present and the accused would be acquitted even if the matter in fact becomes public.[137]

Where the contempt is in the form of a violation of a court order, it must be shown that the alleged contemnor had knowledge of the order and had an opportunity to comply with it, even though the person was not named in it.[138] This requirement was met in the circumstances in the case of *MacMillan Bloedel Ltd.* v. *Simpson*.[139] The accused protestors were given copies of the injunction and its terms were read to them. Each protestor was then given an opportunity to leave the area. Only those who did not leave were arrested and charged with contempt.

This test has been interpreted to mean that the accused need not have knowledge that the authority of the court would be depreciated by violation of its order: "Recklessness as to the effect of their conduct on the authority of the court is sufficient."[140]

(*j*) The Defence of Truth

Whenever contempt is alleged to be committed by words the defence of truth may be available to an accused. This may not apply if the impugned conduct is a verbal or partly verbal outburst in court which interferes with proceedings because in such cases the disturbance may be the offence.

If words spoken in or out of court do not disturb proceedings then truth is a defence. For example, in *Kopyto*, Cory, J.A. said an accused who says the judge took a bribe must be given an opportunity to prove his or her assertion. Dubin, J.A. with whom Brook, J.A. concurred, said "truth is a defence to a charge of contempt of court by scandalizing the court".[141]

The more difficult cases are those where the impugned words, as in *Kopyto*, are more an expression of opinion than of fact. In such cases, it appears the defence of truth is not available because of the nature of the statement, but Cory, J.A. said a statement of sincerely held belief on a matter of public interest not obscene or criminally libelous comes within the protection of s. 2(*b*) of the *Charter*. With this Goodman, J.A. appears to concur. This raises a subjective question about the beliefs of the alleged contemnor on which he or she is, of course, entitled to the benefit of reasonable doubt.

For all practical purposes, therefore, it will be rare when scandalizing a court will be an offence and judges should be slow to initiate such proceedings. The preferable course will be to leave such matters to the parties or to the Attorney General.

(*k*) Contempt and the Charter

The *Charter*, being a part of the supreme law of Canada, should be applied in the management of contempt cases. For example, when hearing a motion for contempt not in the face of the court there will seldom be any reason why an alleged contemnor should not be granted an adjournment if requested and given usual fairness safeguards.

In some cases, however, it might be an abdication of judicial responsibility not to deal with a serious contempt on the spot. Generally speaking, it will usually be possible to deal effectively with a serious contempt possibly by having a contemnor taken immediately (if necessary) into custody, and to conduct a hearing subsequently in accordance with traditional safeguards.

It should not be assumed that the authority of a superior court judge to deal effectively with contempt is compromised by the *Charter*. All of the legal rights in the *Charter* are qualified by s. 1 which may support prompt judicial action when confronted with serious contempt situations in the face of the court. Such was the result in *B.C.G.E.U.* v. *A.G. of B.C.*.[142] Furthermore, the court's inherent jurisdiction is a part of the office created by s. 96 of the *Constitution Act, 1867* which is itself a constitutional provision. It is conceivable that the court's summary power to deal with contempt might some day be necessary in order to protect the Constitution.

In the *Newfoundland Association of Public Employees* case,[143] Dickson, C.J.C. speaking for the Court, said:

> The point is that courts of record have from time immemorial had the power to punish for contempt those whose conduct is such as to interfere with or obstruct the due course of justice; the courts have this power in order that they may effectively defend and protect the rights and freedoms of *all* citizens in the only forums in which those rights and freedoms can be adjudicated, the courts of civil and criminal law. Any action taken to prevent, impede or obstruct access to the courts runs counter to the rule of law and constitutes a criminal contempt. The rule of law, enshrined in our Constitution, can only be maintained if persons have unimpeded, uninhibited access to the courts of this country.[144]

It should be remembered, however, that even without reference to the requirements of the *Charter*, summary contempt proceedings should normally give the alleged contemnor notice of the obligation to show cause, an adjournment to seek legal advice or representation and, if convicted, an opportunity to make submissions on sentence.[145]

There may be a division of opinion between the Courts of Appeal of Québec and Ontario. The former has held that a person facing an allegation of contempt committed not in the face of the court is not "...charged with an offence" under *Charter* s. 11.[146] The latter, in *R.* v. *Cohn*,[147] held that

a person against whom contempt is alleged by refusing to give evidence is "charged with an offence" within *Charter* s. 11. *Laurendeau* is cited with apparent approval in *B.C.G.E.U.* v. *A.G. of B.C.*,[148] but not necessarily on this point.

In *Cohn*, the Court assumed an allegation of contempt was equivalent to a "charge" and went on to consider a number of *Charter* considerations and resolved most potential conflicts, but whether an alleged contemnor is to be considered as a person "charged" or not, it will be advisable, except in cases of urgency threatening the authority of the court, to proceed as if the contemnor has been charged with an offence.

This issue was also raised in *R.* v. *Toth*.[149] At trial, the judge rejected counsel's argument that proceedings for contempt should not be held in the absence of a sworn information or indictment particularizing the allegations of contempt. Rather, the trial judge held that it was enough that the alleged contemnor knew he faced contempt proceedings for certain actions he committed in violation of a specified injunction. The Court of Appeal declined to comment on this point.

The judgment in *Cohn* can be broken down under the following sub-headings:

(i) *The Right to Know Specifically what is Charged*

It was held that the description of contempt cited from *R.* v. *Gray*,[150] and presumably other well known authorities provides a satisfactory definition of the offence. It is important, however, that an alleged contemnor be informed precisely what is alleged against him or her, *i.e.* for refusing to be sworn or refusing to give evidence, or for disobeying a court order, *etc.*, and he or she should be given all reasonable particulars, especially when contempt out of the face of the court is alleged. These particulars need not be in writing, for in most cases the issue can be stated orally with sufficient precision.

(ii) *The Right to Call Witnesses*

This is a right which should always be afforded a respondent charged with contempt for he or she might otherwise be required to give evidence himself or herself or be deprived of evidence required for the defence.[151]

(iii) *The Right to be Presumed Innocent*

It was argued that the accused should not be subject to trial by the judge before whom the alleged contempt took place. It was held that there was nothing in the circumstances of the case that would reasonably create an apprehension of bias or lack of impartiality. It would, perhaps, be otherwise if the judge displayed undue annoyance or impatience or if he or she appeared to prejudge the matter. More difficult is the situation where the judge is personally attacked. It is suggested in *Cohn* that such a judge should not hear the matter but, as this is *obiter*, one may suggest that this conclusion would abolish the "on the spot" summary disposition so important in some situations.

Judges should always be careful to ensure that no reasonable apprehension of bias is created and there may well be cases where the course of the proceedings will suggest that some other judge should hear the matter, particularly if there is a record of the proceedings so that the judge will not have to be a witness.[152] But there is no need to refer a matter to another judge when someone commits an undoubted contempt, particularly in the face of the court (*e.g.* "mooning").

(iv) *The Show Cause Procedure*

It was argued that this process reverses the onus of proof and requires the accused to at least raise a doubt about his or her guilt. The Court held otherwise, finding that when the facts are clear and are all known personally to the judge, it is only the burden of calling evidence and not the burden of proof that is shifted.

While the foregoing states the law applicable to the facts of *Cohn*, it may be different if all the facts are not known personally to the judge. In such circumstances, a "show cause" procedure may offend the *Charter* as a reverse onus. The preferred procedure is for the alleged contemnor to be summonsed to attend at a hearing to determine whether he or she is guilty of contempt, and proper particulars should always be given.[153]

In *Vidéotron Ltée* v. *Industries Microtec Produits Electriques Inc.*,[154] it was held by the Supreme Court of Canada that a person who is sued for contempt in a civil case, but who faces imprisonment if convicted, cannot be compelled to testify against himself or herself. This is notwithstanding art. 309 of the Québec *Code of Civil Procedure*, for to hold otherwise would violate s. 33.1 of the Québec *Charter of Human Rights and Freedoms* and s. 11(*c*) of the *Canadian Charter of Rights and Freedoms*.

In the case of criminal contempt, the standard of proof must always be beyond reasonable doubt.

(v) *The Right to Trial by Jury*

While in theory the punishment for contempt is unlimited, at common law, sentences substantially shorter than 5 years have been the norm. The Court mentioned that no modern Canadian case was cited where the final sentence exceeded 2 years. The Court said:

> The common law with respect to sentencing for contempt of court has crystallized to such a degree that it can now be said that contempt of court of the kind with which we are here concerned, at any rate, is not an offence which is punishable by a sentence of five years or more imprisonment.[155]

It was, accordingly, decided that the Court, in exercising its inherent common law jurisdiction, must recognize that an appropriate sentence of imprisonment must be for a period of less than 5 years.[156]

In *MacMillan Bloedel Ltd.* v. *Simpson*,[157] MacEachern C.J.B.C. traces the history of summary procedure in contempt and concludes that such matters have generally been decided summarily by judges alone. He went on to follow the approach of the Ontario Court of Appeal in *Cohn*, noting that there was no difference between *in facie* (as in *Cohn*) and *ex facie* (as in *Simpson*) cases in this respect.

In summary, the present law properly applied does not seem to offend against the *Charter* or the principles of fairness as long as appropriate safeguards are afforded to every alleged contemnor.

Additional support for this conclusion is provided by the Supreme Court of Canada decision in *United Nurses of Alberta* v. *Alberta (Attorney General)*,[158] that criminal contempt does not violate s. 7 of the Charter. In her decision, McLachlin J., speaking for the majority, rejected the appellant's argument that uncodified common law crimes (including criminal contempt) offend fundamental principles of justice. She also held that the offence of criminal contempt was neither vague nor arbitrary. There is a clear distinction between criminal and civil contempt which allows a person to predict whether his or her conduct is a crime.

The Newfoundland Supreme Court (Trial Division) recently discussed the effect of the Charter on the *sub judice* rule in *R.* v. *Robinson-Blackmore Printing and Publishing Co.*[159] Halley J. held that although it infringes a person's right to freedom of expression under s. 2(*b*) to prosecute him for criminal contempt for publishing an article in a newspaper that presents a real risk of prejudice to the fair hearing of an accused, such prosecution is saved by s. 1. The *sub judice* rule, furthermore, is not contrary to principles of fundamental justice (s. 7) and does not offend the right to trial by jury (s. 11(*f*)).

(*l*) The Involvement of the Judge

There can be no rule that a judge should not preside or continue to preside at a trial or hearing when a contempt has been alleged just because he or she has been attacked or criticized, for if there were such a rule a judge could easily be driven out of a case. Similarly, a judge should not disqualify himself or herself just because he or she has been attacked, his or her order has been disobeyed or contumacious conduct has taken place in his or her courtroom, particularly if disqualification will delay proceedings to the prejudice of any party. In some cases it is highly desirable that some questions of contempt be resolved "on the spot" and judges should be firm in this connection. It may be, for example, that any judge would come to the same conclusion.[160]

But, if it is possible to sever an alleged contempt from a proceeding at bar, a judge should consider stepping aside if he or she is personally involved,[161] or if he or she has expressed any opinion which might reasonably be regarded as a prejudgment, or if the circumstances raise any *bona fide* question of bias, interest or partiality on the part of the judge beyond a mere allegation.[162]

In *R.* v. *High Sierra Broadcasting Ltd.*,[163] when faced with defamatory statements made before him and directed at him, as well as radio broadcasts of similar allegations, a judge ruled that the hearing which he was to conduct could not proceed before him as scheduled and transferred the matter to another judge. He also declined to deal with the alleged contempt and the Attorney General, at the judge's request, took over conduct of the case, which was heard before a different judge. This was likely a prudent move for, at trial, in reply to the alleged contemnor's allegations, the judge had accused the alleged contemnor of deliberately attempting to select the judge to hear the petition and to delay the hearing and final disposition of that proceeding at the expense of the other parties. This accusation by the judge, had he heard the contempt motion, might have been viewed as prejudgment.

In *R.* v. *Toth*,[164] the British Columbia Court of Appeal approves of the answer given by the trial judge in the decision on appeal in regard to allegations that he was in some way biased because he had presided over other matters in which similar issues had been raised. To quote Wood J., the trial judge:

> [I]t is always difficult and troublesome to a judge, when faced with proceedings of the sort that are before me today, to be certain that things said or done, rulings made, impressions gained, if you will, in other proceedings have not in some way affected one's ability to govern fairly - or not to govern - to judge fairly and to decide issues of fact and law fairly and impartially between the parties. That is a problem which faces any judge on any occasion. It is more complex and more difficult when there is a repetition of proceedings such as we have had in this Province over the last several months. On the other side of the coin, it is important that any suggestion of bias or predisposition be scrutinized carefully to ensure that there is some justification for it before it is given effect. Were it otherwise, those who were cynically minded would find a way to disqualify virtually every member of the judiciary and by that very process, avoid ever having to face the consequences of their conduct. So there's a balancing that has to be undertaken. And unfortunately, in the circumstances in which I am faced with this decision, I am the one who has to perform the exercise of balance. The only thing that I can do, Mr. Christie, at this point in time, to resolve the matter, is to assure that I do not feel at this point in time that any ruling which I have previously made in connection with similar or related matters has in any way affected my ability to try these persons fairly and impartially and according to law. I, of course, consider myself bound by my previous rulings, and unless persuaded that there is a justification and a jurisdiction for doing so, I intend to follow them. But those are rulings of law. With respect to the matters of fact that have to be determined here in these proceedings, I can think of no reason at the moment why my ability to decide those issues of fact is or should in any

> way be affected by those proceedings over which I have previously presided.
>
> And accordingly, your motion - your second motion, if I characterize it correctly, to have me disqualify myself, must be dismissed.

(*m*) The State of Mind of the Judge

As contempt is a legal question, it requires serious detached consideration. As soon as a question of contempt arises, a judge must ask himself or herself: "Am I able to act judicially and with complete impartiality?" and "Will I be perceived by right-thinking persons to so conduct myself?"[165] If those questions cannot both be answered in the affirmative then an adjournment and the assignment of a different judge is required as a debt of justice. A judge should never preside over a court when he or she is angry, however seriously he or she may have been provoked.

(*n*) The Trial or Hearing of an Alleged Contemnor

Contempts committed in the face of the court may be tried summarily, that is without additional evidence, if sufficient facts are known personally by the judge. The law permits this so that the judge before whom a contempt has been committed will not be a witness and because of the considerations mentioned by Wills, J. in *R.* v. *Davies*:[166]

> ...[T]he undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy. It is true that the summary remedy, with its consequent withdrawal of the offence from the cognizance of the jury, is not to be resorted to if the ordinary methods of prosecution can satisfactorily accomplish the desired result, namely, to put an efficient and timely check upon such malpractices. *But they do not.* (emphasis added)

A judge before whom a contempt is committed should, however, put his or her knowledge on the record by stating it in court so that the respondent will know what he or she has to meet.

But an alleged contemnor must be treated fairly and afforded his or her *Charter* rights and protections, some of which are mentioned in *R.* v. *Cohn*, *supra*, which include at least the presumption of innocence; the right to apply for but not the absolute right to an adjournment in or out of custody to prepare a defence or to obtain counsel; the right to apply for interim judicial release; the right to counsel; the right to be informed precisely what is alleged and to particulars; the right to cross-examine witnesses, if any, but not to cross-examine the judge unless he or she gives evidence; the right to give evidence or to refuse to testify, and to call witnesses; the right to make submissions on guilt and punishment; and, of course, proof beyond reasonable doubt.

These safeguards must give way to the right and duty of a judge to control what happens in the courtroom. If there is a disturbance, or if someone becomes unruly or overly aggressive and refuses to behave after being warned or abuses either the court or any participant to the proceedings then, of course, he or she may forthwith be expelled from the courtroom or taken into custody. After that, however, unless there is some special reason why the person must be dealt with "on the spot", he or she should then be afforded the rights just mentioned.

Unless the contempt is one that must be decided on the spot in order to preserve the court's authority or permit the work of the court to be carried on in an orderly way, it is often desirable to adjourn any question of contempt to the end of the proceedings or to another time in order to give passions time to cool, and to permit all parties to consider their position. Often an apology will be tendered which will permit the matter to be resolved more easily.

In *Roy*[167] the trial judge actually witnessed non-verbal exchanges between two jurors and the respondent during the course of the trial which made it necessary for him to preside at the contempt hearing which was not heard until after the murder trial was completed. On the other counts (non-compliance with rulings, persisting in arguing points decided against her, and dishonestly putting to the witness only parts of answers given at the preliminary inquiry), the trial judge who initiated the contempt proceedings could have referred the hearings of these counts to another judge, but he was not obliged to do so. In his reasons for judgment he stressed that it was absolutely necessary not just to read the transcript, but also to listen to the tapes, and he was undoubtedly in a better position than another judge to assess the significance of counsel's conduct.

If the contempt is out of the face of the court, a party to proceedings at bar may commence contempt proceedings. This is always preferable to the court taking action on its own motion. In such case the proceeding should be commenced by Petition or Notice of Motion and the show cause format should be avoided.

Frequently, a party obtaining an order which has been breached will not be willing to bring contempt proceedings or to continue them if the private dispute has been resolved. Such was the case in *Poje*[168] where an injunction in a labour dispute was violently disobeyed and contempt proceedings were commenced by the Plaintiff. The dispute was then settled and the Plaintiff did not wish to carry the matter further. In that case, the Court considered the disobedience was so serious that it could not be overlooked. The Court accordingly directed the proceedings be continued and the Attorney General assumed conduct of the prosecution which led to one of the contemnors being sent to jail. A useful alternative, rather than actually initiating proceedings *ex mero motu*, is to convene court in the presence at least of counsel who obtained the order being disobeyed, and ask him or her to inform the Attorney General of whatever alleged disobedience has come to the attention of the court.

Again, it is often useful to adjourn these matters one or more times if circumstances permit in order to give the alleged contemnor an opportunity to consider whether he or she should purge the contempt.

At the hearing, criminal contempt must be established beyond reasonable doubt. This may be established in part by the judge's personal knowledge, if any, but such knowledge must be clearly stated in court so that all parties will know precisely what knowledge the judge has. This is not usually a factor in cases of contempt out of the face of the court, but the judge is entitled to rely upon the fact of anything which has happened in court and other matters of which cognizance may be taken. Alternatively, the evidence may comprise part personal knowledge of the judge, part affidavits and part *viva voce* testimony. An opportunity for cross-examination on affidavits should be given in most cases. The important thing to remember is that the judge decides how to proceed but the process must be fair.

In some cases, there may be doubt whether a contempt is one committed in the face of the court or otherwise. This is illustrated by the cases discussed earlier.[169] If there is doubt on this question it will always be preferable to proceed as if the contempt occurred out of the face of the court and to refer the matter to another judge or conduct a summary hearing based upon evidence or admitted facts rather than upon the court's own knowledge. If anything happened in court which is material it can usually be proved by calling a court reporter or a court clerk.

In cases where a contempt is alleged during the course of proceedings, and is adjourned to the end of the trial, the parties will often agree upon facts making it unnecessary for evidence to be adduced. The fact that a trial is over, and the exercise of the court's jurisdiction in contempt is not necessary to ensure the proper administration of justice does not exhaust the court's jurisdiction, for the question of contempt or no contempt must be determined as of the date of the impugned conduct.[170]

(*o*) Procedural Guidelines for Contempt in the Face of the Court

Legal proceedings, particularly trials, are not a tea party[171] and judges must not be too sensitive. While judges must always be vigilant to preserve institutional dignity and authority, there are many occasions where contumacious conduct should be stared down or overlooked. A court loses respect if it is offended too easily. Many experienced judges have never found it necessary to resort to contempt proceedings in order to preserve order in their courtrooms, or they have wisely ignored much vulgar abuse without doing harm to their dignity or authority.[172]

Often, when things are getting testy in court, or when there is an outburst of some kind, a warning is all that is necessary. On other occasions it is sometimes useful to adjourn court abruptly, with or without a warning, in order to give everyone an opportunity to compose themselves.

It is highly desirable to avoid contempt proceedings because, *inter alia*, they embroil the court in distracting collateral issues, and they start the court down a road which is not its regular circuit. The judge becomes a party in his or her own court. Judges should always remember the admonition of Lord Russell in *R.* v. *Gray*,[173] and often repeated in other judgments, that the court's jurisdiction in contempt is:

> ...to be exercised with scrupulous care...only when the case is clear and beyond reasonable doubt...

A modern Canadian statement to this effect is found in the judgment of Owen, J.A. in *Hébert*:

> I am of the opinion that (summary power) should be reserved for emergency situations where prompt and drastic action is required to prevent the obstruction of the orderly and effective administration of justice.[174]

Similarly, the Supreme Court of Canada has recently endorsed the following statement of Lord Denning in *Balogh* v. *Crown Court at St. Albans*:[175]

> *This power of summary conviction is a great power*, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge and to ensure a fair trial. *It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately - so as to maintain the authority of the court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced - and the like. It is, of course to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt....*But properly exercised, it is a power of the utmost value and importance which should not be curtailed.[176]

If it is necessary to engage the court's contempt jurisdiction it must be done only to preserve the dignity and authority of the court and to ensure that the court's business will proceed in an orderly way and not to assuage the personal discomfort, annoyance or outrage of a judge.

Outbursts by parties, witnesses or spectators are not uncommon in high profile or semi-political trials. This is usually managed by a stern warning and perhaps a brief adjournment. Participants at trials usually behave better after such a judicial *tour de force* and there is something very dignified about a court asserting itself calmly and without unnecessary fireworks.

An unruly accused in a criminal case is always a problem but firmness, which should be exhausted before more drastic measures are taken, will usually suffice. If necessary, it is permissible to exclude an unruly accused from a part of his or her trial but this should be done only after all other measures have failed. There is usually not much point in directing the commencement of contempt proceedings against an accused who has just been convicted on a serious indictment regardless of what he or she says or does. The court's authority is best demonstrated by the dignified way in which such authority is exercised.

Obstreperous or difficult counsel can be a serious problem. Particular firmness is necessary in such circumstances and a warning coupled with an appeal to professionalism is often successful.

Above all, it is necessary for the court to remain firm, calm and patient, as virtue is indeed its own reward. Judges who are having difficulty with counsel should remember the comment of Lord Goddard, C.J. in *Shamdasani* v. *King Emperor*:

> Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended.[177]

See also *Re Guy Bertrand*[178] where counsel for an accused was cited, but acquitted, for arguing with "a rather brutal frankness" but "humbly" and "with deference and respect" that his client had been unfairly punished and that her *Charter* rights had been violated by reason of being detained after conviction, pending sentence. In our view counsel should not be inhibited by the risk of contempt from presenting any submission. There are better ways than contempt for a judge to dispose of untenable arguments, usually by hearing an outline of the argument and by ruling calmly and dispassionately that it is untenable, or totally without merit, but, of course, he or she must be right. If there is any doubt, the judge must hear the argument.

The foregoing does not solve the problem of the lawyer who persistently misbehaves or disobeys rulings. In such cases, contempt may be the only answer, but warnings should always be given before contempt is alleged. Judges who find lawyers guilty had better be right as appellate courts seem usually to reverse findings of contempt in these situations.

Probably the most difficult question of contempt that is likely to arise in the course of a trial is the witness who refuses to be sworn or to testify. Often they are persons who subjectively may have a very good reason not to give evidence. There is no doubt, in view of *Vaillancourt*,[179] that the refusal of a witness to give evidence is a criminal contempt. A judge dealing with such a problem must be firm, particularly if the evidence is important to one party or another and the reluctant witness must be made to understand that he or she must answer all proper questions. If the witness refuses or pretends not to know the answer, he or she may be taken into custody or otherwise be given an opportunity to consider his or her position. This can be done one or more times without making a finding of contempt, but eventually it may be necessary to allege contempt and to conduct a hearing if the party seeking the evidence will not withdraw. Sentencing should be put off, if possible, to the end of the trial (if it is not too long a trial), and the contemnor may be released or kept in custody as circumstances may require.

Of particular difficulty are the frightened witness, the child giving evidence against a relative, and a complainant or victim in a family law case. It is incongruous, to say the least, that the result may be that the witness/victim goes to jail for contempt while the alleged wrongdoer

walks, but the integrity of the judicial process requires judges to be firm on this question as a refusal to testify, which occurs only rarely, may become commonplace.

If the matter has been handled skilfully, the Crown may make a conviction for contempt unnecessary by not pressing for an answer in a hardship case, such as where it becomes obvious that there will not be an answer or if the witness has already been taken into custody as part of the process. If sentence for contempt has not been imposed by the time the case is over, it may not be necessary to sentence for more than the time already spent in custody, but these are delicate questions which require careful management.

Often contempts in the face of the court occur after judgment or verdict has been delivered or sentence has been pronounced. Experienced judges recognize that things are sometimes said or done in such circumstances that are really the product of intense disappointment and should be overlooked, particularly outrage on the part of litigants or their supporters. Often no harm will come to the court's authority if the judge simply leaves the bench. There is, however, no proper time for outbursts by counsel and it might not be so easy to overlook unprofessionalism at this stage but, fortunately, it occurs infrequently. Courts must, however, always keep in mind the distinction between discourtesy and contempt.[180] The former is the responsibility of the governing professional body.[151]

(*p*) Procedural Guidelines for Contempt not in the Face of the Court

This kind of contempt falls into two categories:

(1) Conduct calculated to scandalize the court or a judge in relation to a proceeding under way or pending.

This is an extremely infrequent occurrence. Remembering that the law of contempt exists to protect the dignity and authority of a court or judge as a court or judge, personal abuse, however offensive, is unlikely to be a contempt. If a contempt should occur and no proceedings are commenced by a party or the Attorney General, a judge affected by such conduct or any judge of that court could direct the commencement of proceedings for contempt. This will usually be unwise. The better procedure is simply to refer the matter to the Attorney General to take such proceedings as he or she considers advisable. A judge referring such a question to the Attorney General should not hear the matter, nor should the judge who has been attacked.

(2) Conduct calculated to interfere with the course of justice in relation to a proceeding under way or pending in a court of justice.

This kind of contempt can take many forms such as a breach of a court order, interfering with the course of a trial, or comments published *sub judice*, *etc.*

Again, the court should be slow to engage the contempt process except in serious cases. *De minimus non curat lex* is a salutary rule as a vigorous justice system can easily withstand most of the slings and arrows of this kind of outrageous fortune.

One of the most common forms of contempt out of the face of the court is disobedience of a court order such as in high profile matters where massive disobedience sometimes occurs. Generally speaking, the court should not take action on its own motion, although the preservation of the court's authority may make this necessary if no one else takes appropriate steps. It is generally helpful for counsel or the Attorney General formally to bring disobedience to the court's attention at the earliest possible moment, because that commences the process towards obedience to the Rule of Law. Experience tells us this kind of disobedience usually gets worse if nothing is done.

Upon the parties being before the court it is often useful to issue stern warnings, but adjourn to give lawyers an opportunity to advise their clients appropriately. If the judge making the order has not initiated contempt proceedings, and has not made any comments prejudging the issue, then there is no reason why he or she should not hear the matter.

From time to time, counsel may bring an apparent contempt to the attention of the court without commencing any proceeding for contempt, hoping or expecting that the court will initiate proceedings or request the Attorney General so to do. Depending upon circumstances, the course of wisdom is usually to decline to take any action and leave it to the parties either to bring proceedings or to inform the Attorney General through counsel of the circumstances. In this way the court's neutrality is maintained.

Unlawful comments published *sub judice* cause much difficulty, particularly if there is a jury. It is often wise for proceedings to be commenced immediately as this is usually the best assurance that there will be no repetition of any unlawful publication. The preferred practice is to leave it to counsel to bring such proceedings or to request Crown Counsel to bring the matter to the attention of the Attorney General. Many experienced judges refuse to take any action in such matters unless it is brought to their attention by counsel and even then they leave it to the parties or to the Attorney General to take action. Having obtained the attention of the alleged contemnor, it is often useful to adjourn the matter to the end of the trial.

Another common problem with contempt out of the face of the court is the failure to pay a money judgment or abide by an order of the court in family and other matters. In the early part of this century, legislatures in some provinces abolished imprisonment for debt. Family legislation has more recently provided specific remedies to enforce the payment of maintenance, *etc.*

In *Mills* v. *Martin*,[182] Steinberg J. of the Ontario Court of Justice dismissed the application of a wife seeking a finding of contempt to enforce an order for payment from the husband. It was held that because no statutory provision existed defining the civil jurisdiction of the court in contempt proceedings, jurisdiction must be exercised in a manner consistent with the Rules of Civil

Procedure, which precluded an order for payment of money to be enforced by way of contempt proceedings.

In some provinces, the law seems to be that imprisonment is not available for failure to pay money judgments. In other provinces the present law is that "...a judgment debtor cannot be imprisoned for failing to pay a money debt but he may be imprisoned for contempt..."[183] but there must be an element of wilfulness where the debtor refuses or neglects to pay when he is in a position to pay or where there is some other ingredient indicating wilfulness and therefore, possibly, contempt. The legislation in each province must be considered before committing for contempt of this kind.

In such cases, all the ingredients of contempt must be strictly proven as this is usually civil contempt and committal could only be made on admissible evidence after a hearing conducted strictly in accordance with the Rules of Court.[154]

Compliance with other family type orders such as custody and access to children, occupation of the matrimonial home, *etc.* are more straightforward, but again there should only be committal for breach of an order in clear cases and, again, an element of wilfulness must be present. It is not uncommon in such cases, if there is no likelihood of harm or prejudice, to give alleged contemnors an opportunity to obey the court's order and thereby possibly purge their contempt.

In *Metz* v. *Metz*,[185] contempt proceedings were brought by a woman against her former husband for failure to adhere to orders relating to possession of the matrimonial home. He had repeatedly entered onto the property and interfered with her possession of the property in violation of several judicial orders. The Court found the husband in contempt, but suspended the imposition of sentence for one year "upon the condition that he shall keep peace and be of good behaviour during the period of the suspension and shall appear before this Court when required to do so by the Court." Additionally, the Court included in the probation order terms and conditions forbidding the husband from being present or near the property.

(*q*) Sentencing for Contempt

In Canada punishment for contempt has been quite moderate, reflecting the courts' usual view that a conviction for contempt and a modest fine is usually sufficient to assert the courts' authority, to protect their dignity or to ensure compliance. Often these sentences are imposed after the contemnor has apologized and purged his or her contempt which substantially mitigates any punishment that might otherwise be imposed. The purpose of sentencing in contempt cases is to "repair the depreciation of the authority of the court". [186]

If the contempt has not been purged and the contempt is a serious one, or if there has been a deliberate disobedience of a court order accompanied by violence or other flagrant misconduct then imprisonment or heavy fines become more likely, but care must always be taken to ensure that the

disposition of the proceedings does not appear to be bullying or vengeful.[187] It is also important that the individual circumstances of each case be taken to account.[188] As Green, C.J. has stated:

> [I]t can be said that no judge relishes the idea of having to initiate proceedings for contempt with the possibility of imposing sometimes severe penalties, including deprivation of liberty and significant financial penalties, on citizens who may often be completely law-abiding and respectful of the law in other respects. No court wants to do that, but it will and must do it if confronted with actions that amount to violations of its lawful orders.[189]

Imprisonment should be imposed only in cases of serious deliberate disobedience, violence or wilful interference with the course of justice. Repeated breaches of a restraining order would justify imprisonment, as would a single breach of an order if the breach were a serious one.[190]

For cases involving failure to obey an injunction, Green C.J. set out the following helpful sentencing principles:[191]

1. The inherent jurisdiction of the court, as a superior court, allows for the imposition of a wide range of penalties for civil and criminal contempt;

2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt;

3. The impact that the contemptuous act has had on the general public, particularly in relation to health and safety matters, is a relevant consideration in determining the level of penalty;

4. It is the defiance of the court order, and not the illegality of any actions which led to the granting of the court order in the first place, which must be the focus of the contempt penalty;

5. Imprisonment is normally not an appropriate penalty for a civil contempt where there is no evidence of active public defiance (such as public declarations of contempt; obstructive picketing; and violence) and no repeated unrepentant acts of contempt;

6. Where a fine is to be imposed, the level of the fine may appropriately be graduated to reflect the degree of seriousness of the failure to comply with the court order;

7. Where the defiance of the order is related to continuance of an unlawful strike resulting in failure to report for work when normally scheduled to do so, the number of times when the contemnor was presented with a clear and visible opportunity to demonstrate his or her intention to comply with the order and does not avail of that opportunity can be used as a rough measure of the degree of defiance;

8. Because the symbolism of continuance of collective defiance in the face of the court order is often significant in encouraging continuance of the contempt by others, and conversely, the symbolism of individuals acting, in the face of group pressure, to comply with the law is also often significant in encouraging others to do likewise, those with a special visible position of leadership within the group, such as shop stewards or union officers who are also members of the unlawfully striking bargaining unit may be regarded as committing a more serious contempt if they refuse to comply with the order, and thereby may appropriately receive a greater penalty;

9. In setting the overall level of penalty, the court may take account of the level of penalty imposed in similar cases in the past and may adjust the penalty upwards or downwards, depending on the court's assessment as to whether previous levels of penalty have had an effective general deterrent effect;

10. In ordering payment of a fine, the court may permit, by imposition of appropriate conditions, the contemnor to satisfy the fine in alternative ways, such as payment to a charity or the provision of free services to the persons harmed by the continuance of the contemptuous behaviour.

While the *Charter* limits imprisonment for any offence not triable with a jury to five years, it will be rare if imprisonment for a non-continuing contempt should exceed a few days or months although cases could arise for a more serious sanction. As mentioned previously, it is stated in *R. v. Cohn*,[192] that no Canadian case was cited where a final sentence exceeded two years. *R. v. Lamer*[193] includes a thorough review of sentences which have been imposed in Canada, England and the United States up to that date (1973).

In two recent British Columbia cases where there was massive disobedience of an order of the court, and many findings of guilt, terms of imprisonment were imposed, but the sentences were suspended on condition that the "prisoners" stay away for a definite period from specified locations (a logging operation in one case, an abortion clinic in the other). In this way, the risk of repeated disobedience was reduced and "protesters" only went to prison if they continued their disobedience.

In one of the above cases, the judge ordered that those found guilty be photographed and fingerprinted under the *Identification of Criminals Act* R.S.C. 1985 c. I-1.

Generally speaking, the court should not impose a requirement for an apology upon a contemnor. This was done in *Ouellet*,[194] but that part of the sentence was reversed on appeal. Many experienced judges regard a genuine apology as a mitigating factor in sentence, but an imposed apology is not likely to be genuine and, therefore, appears petty and meaningless.

In the following cases, novel sanctions were devised or discussed by presiding judges:

In *Cottick* v. *Cottick*,[195] the husband in a matrimonial property action was found at trial to be in contempt for failing to follow an interim order relating to the disposition of his assets. It was later ordered that he would have no right to participate in related proceedings until he had purged this contempt by complying with the terms of the court orders. On appeal, the Manitoba Court of Appeal held (Huband J.A. dissenting) that the order preventing participation until contempt purged was valid, for:

> it would be an abuse of process if the appellant husband was permitted to proceed with his appeal while still refusing to obey a lawful order of the Court of Queen's Bench affirmed by this court. A litigant cannot, on the one hand, flout this orderly process and orders of the courts and, on the other hand, expect to continue to utilize those same process for his own purposes.[196]

In *Young* v. *Young*,[197] Cummings J.A. discusses the practice of making counsel pay his or her own costs for conduct at trial which amounts to contempt.

In *Westfair Foods Ltd.* v. *Natherny*,[198] the Manitoba Court of Appeal upheld the sentence of community service imposed at trial for contempt committed during a strike. The Court held that it had jurisdiction to impose such a sentence, that the sentence was fit in the circumstances, and a two-year delay in sentencing did not justify altering the sentence.

In *Delorme* v. *Harris*,[199] Rooke J. of the Alberta Queen's Bench invoked the inherent jurisdiction of the court to require the defendant, who had breached a restraining order against his girlfriend, to undergo treatment for psychiatric, drug and alcohol problems. If the treatment was completed and the defendant indicated an intention to obey the order, the contempt would be purged. If not, the defendant would serve six months in an appropriate treatment facility.

APPENDIX A - QUESTIONABLE USES OF CONTEMPT POWERS

R. v. *Jolly* (1990) 57 C.C.C. (3d) 389 (B.C.C.A.)

The appellant had originally appeared in Provincial Court on a criminal charge in an intoxicated state. The Provincial Court judge cited him in contempt, adjourned the hearing, and directed that a show cause hearing be held at a later date. When the appellant appeared at the subsequent show cause hearing he was again intoxicated, and was again cited for contempt. This time, however, the judge proceeded with the hearing, questioned the appellant, and made findings of contempt for both incidents.

The Court of Appeal for British Columbia held that the Provincial Court judge had made a fatal error: because the appellant was intoxicated at the second hearing (at which he was convicted), he was not in a fit state to stand trial and defend himself for either of the alleged contempts. The Court of Appeal allowed the appeal and quashed the findings of contempt.

Hébert v. *A.G. for Québec* (1966), 50 C.R. 88 (Que. C.A.)

The Attorney General obtained a rule *nisi* commanding the alleged contemnor to appear and show cause why he should not be committed for contempt for writing a book critical of the Crown and trial judge's handling of the *Coffin* case. On return of the rule the respondent was refused the right to call witnesses. The conviction was eventually quashed, the Quebec Court of Queen's Bench, Appeal Division, taking issue with the procedure used. The Court held that since the offending book was published several years after the trial there was no need to deal with the matter expeditiously. Mr. Justice Casey held that since a person is entitled to criticize the administration of justice, a person must be entitled to establish facts vital to the defence. This implies a right to produce witnesses, a right which the accused was denied.

R. v. *Strang* (1968), 62 W.W.R. 310 (Terr. Ct.)

A justice of the peace in the Northwest Territories cited an accused for contempt for smoking in court and making a remark in a "sneering" tone then sentenced him to two days in jail and ordered the clerk to close the court. The accused was then arrested and conveyed to jail to serve his sentence. The territorial court quashed the conviction on the grounds that the accused was given no opportunity to answer the charge.

R. v. *McNiven* (1974), 6 O.R. (2d) 127 (C.A.)

The accused engaged in an exchange with the trial judge about his right to appear as agent. The judge said that the accused was getting "lippy", but evidence of this did not appear in the transcript. After the accused had been kept in custody a short time the judge reviewed the matter and convicted the accused of contempt on the basis of his manner and "tone of voice". Although the accused did

not believe he was being contemptuous he apologized. The conviction was set aside on appeal since the record did not disclose any contempt.

R. v. *Fox* (1977), 70 D.L.R. (3d) 577 (Ont. C.A.)

The accused was counsel for a defendant who was on trial before a jury. On the second day of the trial the accused was an hour late for the trial. He had telephoned the court to explain that he would be late 20 minutes after the court was due to convene. He explained the delay in phoning by stating that he was trying to fix the car. He admitted that since he left late to go to the courthouse he might have been a little late anyway. The trial judge did not accept the accused's excuse, found him in contempt and fined him $100.00. On appeal from his conviction Mr. Justice Arthur Martin of the Court of Appeal of Ontario, held that although the unexplained failure of counsel to attend court when scheduled to do so may constitute contempt, in this case the accused's conduct was a discourtesy not amounting to an act of contempt.

R. v. *Jones* (1978), 42 C.C.C. (2d) 192 (Ont. C.A.)

A lawyer failed to attend the continuation of a preliminary inquiry. He explained that he had inadvertently forgotten to enter the date in his diary and he apologized to the Court. The trial judge rejected the explanation and convicted him of contempt. On appeal Mr. Justice Arthur Martin held that the lawyer's conduct which amounted to inadvertence did not have the necessary degree of fault to justify a conviction for contempt.

R. v. *Pinx* (1980), 50 C.C.C. (2d) 65 (Man. C.A.)

The accused lawyer was scheduled to be in two provincial courts on the same date. Although aware of the problem earlier he attempted unsuccessfully to solve it the day before by having an associate represent one of his clients. On the date set for both matters he asked the magistrate on one case if he could be excused. This had been permitted on previous occasions but the magistrate refused. Accused then telephoned his other client and told him to plead guilty and ask for a pre-sentence report. The magistrate in the other case refused to accept the plea and adjourned the case to the following week with instructions to the accused that he would be required to attend. On that date the accused attended, explained why he had not been present and offered his apology. The magistrate then stated that he found him in contempt of court and adjourned the matter for sentence. On the latter occasion the accused appeared with counsel, the magistrate confirmed the findings and imposed a fine of $500.00.

The Manitoba Court of Appeal held *inter alia* that in the case of an absent lawyer the court must first bring the lawyer before it, and the lawyer, if charged with contempt, must be given the right to make full answer and defence. At a minimum the court found that this requires that the lawyer be given notice that he is facing a charge of contempt. While it may not be that an actual citation in writing calling on the lawyer to show cause is always required, what occurred here fell below the minimum as the conviction was made without a charge and without notice of a charge.

[See also *R.* v. *Bunn* (1994), 97 Man. R. (2d) 20 (C.A.), which is to a like effect.)

R. v. *Barker* (1980), 53 C.C.C. (2d) 322 (Alta. C.A.)

A lawyer was operating his own tape-recorder so that he could have a record of proceedings. His right to do so without permission was challenged by the presiding judge and a conviction for contempt ultimately entered. Morrow, J.A. of the Court of Appeal set aside the conviction on the basis that the appellant had explained that no offence was intended and that in all the circumstances counsel had not acted in such a way as to bring the court into disrepute.

R. v. *Traynor* unreported, Ont. C.A. Feb. 25, 1982

The accused made a considerable amount of noise leaving the court after conviction. He attributed the noise to a physical disability and declined to apologize when invited to do so. The accused was convicted summarily of contempt. The conviction was overturned, *inter alia* because the judge did not give due consideration to the accused's explanation.

R. v. *Ayres* (1984), 15 C.C.C. (3d) 208 (Ont. C.A.)

On December 9th, 1984, the accused was brought to a courtroom and refused to testify against a co-accused because he was afraid of what the latter would do to him in the penitentiary. The trial judge gave him overnight to consider his refusal. He was recalled to court on the 13th and again refused to be sworn. Counsel for the accused argued, *inter alia*, that the case should be adjourned because the accused had not had sufficient opportunity to consult with him, to prepare his defence of common law duress and to call witnesses in his defence. The trial judge proceeded then and there on the basis that the contempt should be dealt with summarily and a sentence imposed so that the accused would be in a position to consider whether he wanted to purge his contempt by being sworn and giving evidence. The accused presented no defence. The trial judge then found the accused to be in contempt and adjourned court for half an hour to allow accused to consult his counsel to decide whether he wished to purge his contempt. The accused did not. The judge imposed a sentence of eighteen months.

On appeal, Mr. Justice Goodman speaking for the Ontario Court of Appeal, found *inter alia* that the accused was deprived of a reasonable opportunity to consider the defences open to him and to procure and call witnesses. Further the court considered that duress should have been weighed in assessing the accused's sentence. The court found that neither the trial of the contempt, nor the sentence, accorded with the principles of natural justice and therefore the conviction and the sentence must be quashed and a new trial ordered.

ENDNOTES

1. (1987), 62 O.R. (2d) 449 (C.A.).

2. Principles (1),(2),(3),(8),(11) were cited with approval in *R.* v. *Bunn* (1994), 97 Man. R. (2d) 20 (C.A.).

3.[1900] 2 Q.B. 36, at 40.

4. The following is an example of this form of contempt:

MR. ORMHEIM: Call Mr. Quechuk to the stand.
THE CLERK: Take the Bible in your right hand. Do you swear that--
MR. QUECHUK: I don't believe in that stuff.
THE COURT: Do you wish to affirm?
MR. QUECHUK: What is that?
THE CLERK: Do you solemnly affirm--
MR. QUECHUK: Sure, I guess.
THE CLERK: That the evidence that you give--
MR. QUECHUK: I do, I guess.
THE CLERK: Do you solemnly swear--
MR. QUECHUK: I guess so.
THE COURT: I am not sure that the witness was sworn in.
MR. QUECHUK: Be right point blank I don't got fuck all to say and as far as I can say you can take this fucking courtroom and shove it up your ass.
THE COURT: Take him away and I'll decide what to do with him.
MR. QUECHUK: Blow it out your asshole you goat.

It is suggested the judge's disposition was a perfectly appropriate judicial response. Later, after enquiring into the question fully, but without any further evidence, the contemnor was found guilty of criminal contempt for disturbing and interfering with proceedings, and in refusing to be sworn, and he was sentenced to 30 days imprisonment consecutive to a sentence he was already serving.

5. *Re Hawkins' Habeas Corpus Application* (1965), 53 W.W.R. 406 (B.C.S.C.). The contempt amounted to wilful refusal to stand when court was called to order.

6. *R.* v. *Hill*, [1974] 5 W.W.R. 1 (B.C.S.C.), aff'd. [1975] 5 W.W.R. 520 (B.C.C.A.), [1975] 6 W.W.R. 395 (B.C.Cty. Ct.) aff'd. [1977] 1 W.W.R. 341 (B.C.C.A.). Accused, counsel in a criminal trial deliberately failed to appear at trial. See also *R.* v. *McKeown* (1971), 16 D.L.R. (3d) 390 (S.C.C.) where counsel also failed to appear at trial. In both cases it was found that the contempt was in the face of the court. In the latter case an appeal to the Supreme Court of Canada failed on technical grounds. Spence and Laskin, JJ. dissented, on the ground that the reason for the failure of the accused to appear was not personally known to the trial judge so it could not be said the contempt was in the face of the court.

In our view the correctness of the treatment of these cases as contempts in the face of the court is questionable. There may have been a contempt in each case but each should have been dealt with not "on the spot" but by a proper hearing. In *McKeown*, particularly, the judge who had the telephone conversation with the accused should not have heard the matter, as the case against the accused depended in part upon the construction to be placed upon that conversation.

In *Roy* c. *Morin* [1989] R.J.Q. 981 (C.S.) counsel defending an accused on a charge of second degree murder was cited by the trial judge for, *inter alia*, non-verbal responses to evidence, and for flirting with jurors by smiling at them and greeting them in an exaggerated manner when they entered the court room. The respondent admitted returning smiles and greetings directed to her.

7. *R.* v. *Vaillancourt*, [1981] 1 S.C.R. 69.

8. *R.* v. *Froese*, [1980] 1 W.W.R. 667 (B.C.S.C.), aff'd. (1980), 23 B.C.L.R. 181 (B.C.C.A.); *R.* v. *Bannerman* (1979), 17 B.C.L.R. 238 (B.C.S.C.), (1979) 50 C.C.C. (2d) 119, (1980) 54 C.C.C. (2d) 315. Both *Froese* and *Bannerman* arose out of *sub judice* comments broadcast over radio and television stations about the criminal history of a principal accused in a major drug conspiracy case. The broadcasts occurred on the first or second day of a trial expected to last one year. The accused moved for a mistrial. In dismissing the motion the trial judge made some comments about the possibility of contempt. The trial judge refused to initiate contempt proceedings but the Crown did so. The contempt proceedings were adjourned to the end of the trial, at which time the trial judge asked another judge to hear it because of the comments he had made in disposing of the motion for mistrial.

9. *Morris* v. *Crown Office*, [1970] 2 Q.B. 114: A group of Welsh students invaded a court and disrupted proceedings by striding into the well of the court, shouting slogans and singing, etc., to demonstrate for the preservation of the Welsh language. They were instantly taken into custody and those who did not apologize were committed to three months' imprisonment although the Court of Appeal bound them over for twelve months to be of good behaviour; *R.* v. *Vermette* (1987), 32 C.C.C. (3d) 519 (S.C.C.): Threatening a complainant after a plea of guilty.

10. *Poje* v. *Attorney General for B.C.*, [1953] S.C.R. 516; *Re Tilco Plastics* v. *Skurjat et al.*, [1967] 1 C.C.C. 131 (Ont. H.C.). The facts of *Poje* are important. An order was made banning picketing at a dock. There was massive disobedience and the Plaintiff brought proceedings for contempt. The dispute was then settled and the Plaintiff did not wish to proceed. The Court, however, considered the matter so serious that it required the application to proceed and the Attorney General assumed conduct of the matter. There was a finding of guilt and one of the leaders of a labour union was sent to jail.

11. *Re B.C.G.E.U.*, [1984] 1 W.W.R. 399 (B.C.S.C.), aff'd. [1985] 5 W.W.R. 421 (B.C.C.A.) (picketing at court houses); and *A.G. of Newfoundland* v. *Newfoundland Association of Public Employees*, unreported, January 10, 1979, (1978) No. 1331 (Nfld.S.C.) (strike of court staff), aff'd (1984), 14 D.L.R. (4th) 323. Both affirmed at [1988] 2 S.C.R. 214 and 204 respectively.

12. *Re Duncan*, [1958] S.C.R. 41: an unsubstantiated allegation of bias made in court upon a member of the Court. In *Re Guy Bertrand* (1989), 49 C.C.C. (3d) 357, 70 C.R. (3d) 362 (Qué. S.C.), a lawyer was cited, but acquitted, of contempt for arguing that an assize judge had "unfairly punished" and infringed an accused's fundamental rights by ordering her detained after conviction pending sentence.

13. *British Columbia Government Employee Union v. A.G. of British Columbia*, [1988] 2 S.C.R. 214, at 234.

14. *McKeown* v. *The Queen* (1971), 16 D.L.R. (3d) 390 (S.C.C.), at 398.

15. *R.* v. *Davies*, [1906] 1 K.B. 32, at 42.

16. *Morris* v. *Crown Office*, *supra*, note 9.

17. *R.* v. *Davies*, *supra*, note 15, at 41-2.

18. (1967), 2 C.C.C. 111 (Qué. C.A.). *Hébert* is a significant case because it explains the kind of cases that should not be tried as it was "on the spot". The respondent Hébert wrote and published a violent criticism of the conduct of certain participants in the famous Coffin murder case. This was published about 7 years after Coffin had been executed. Hébert was summonsed to show cause why he should not be found in contempt but he was not permitted to call all of his witnesses as the Court concluded that his contempt was apparent from his writings. This was reversed by a majority of the Court of Appeal.

19. (1970), 23 *Current Legal Problems* at 27-8. Sir Jack Jacobs summarizes the inherent jurisdiction at pp. 24-25 as follows:

> (1) The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.
>
> (2) The distinctive and basic feature of the inherent jurisdiction of the court is that it is exercisable by summary process, i.e., without a plenary trial conducted in the normal or ordinary way, and generally without waiting for the trial or for the outcome of any pending or other proceeding.
>
> (3) Because it is part of the machinery of justice, the inherent jurisdiction of the court may be invoked not only in relation to the litigant parties in pending proceedings, but in relation also to anyone, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties.
>
> (4) The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their

operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

(5) The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

Jacobs' paper was quoted with approval in *B.C.G.E.U.* v. *A.G. of B.C.*, *supra* note 13, at 240.

20. *Supra* note 9.

21. (1988), 42 C.C.C. (3d) 220 (Qué. C.A.).

22. [1990] 1 S.C.R. 851.

23. See discussion of this issue below in section 3(h) "Statutory Courts, and Courts and Tribunals of Inferior Jurisdiction".

24. *Balogh* v. *St. Albans Crown Court*, [1975] 1 Q.B. 73 (C.A.).

25. *Ibid.* at 84-85.

26. *Supra* note 13.

27. At 239.

28. [2000] O.J. No. 4446 (Ont.S.C.J.).

29. (1990), 73 D.L.R. (4th) 83 (Alta. Q.B.), 108 A.R. 173, 74 Alta L.R. (2d) 372, [1990] 5 W.W.R. 498, 58 C.C.C. (3d) 114.

30. (1995), 30 Alta. L.R. (3d) 236 (Q.B.), at 241.

31. *A.G.* v. *Times Newspapers*, [1973] 3 All E.R. 54 (H.L.).

32. *R.* v. *Bowes Publishers Ltd.* (1995), 30 Alta. L.R. (3d) 236 (Q.B.), at 241. See also *R.* v. *Southam Inc.* (1992), 6 Alta. L.R. (3d) 115 (Q.B.), reversed on other grounds (1995), 30 Alta. L.R. (3d) 268 (C.A.), where the Court held that the risk of prejudice must be "real" - it need not be real *and* substantial. Ultimately, the Court of Appeal held that whether the test was a "real" or a "real and substantial" risk of prejudice, the test was not met on the facts.

33. *Bowes Publishers Ltd., ibid.*, at 240.

34. *Toronto Sun Publishing Corp. v. Attorney General for Alberta* [1985] 6 W.W.R. 36 (Alta.C.A.).

35. R. v. Pacific Press, [2001] BCSC 178, at p. 9.

36. [1994] 3 S.C.R. 835.

37. See *R. v. Edmonton Sun* [2000] ABQB 283.

38. See, *e.g.*, *MacMillan Bloedel Ltd.* v. *Simpson* (1994), 113 D.L.R. (4th) 368 (B.C.C.A.), aff'd on other grounds [1995] 4 S.C.R. 725. See also *Canada (Human Rights Commission)* v. *Canadian Liberty Net*, [1998] 1 S.C.R. 626; *British Columbia (Attorney General)* v. *Perry Ridge Water Users Assoc.*, [1998] B.C.J. No. 350 (B.C.S.C.).

39. *F.(E.)* v. *S.(J.S.)* (1995), 30 Alta. L.R. (3d) 401 (C.A.), citing *Hadkinson* v. *Hadkinson*, [1952] 2 T.L.R. 416 (C.A.).

40. See, e.g., *Werner v. Warner Auto-Marine Inc.* [1996] O.J. No. 3368 (Ont.C.A.).

41. (1991), 54 B.C.L.R. (2d) 273 (B.C.C.A.), at 287.

42. (1991), 47 C.P.C. (2d) 214 (B.C.S.C.).

43. [1990] 3 S.C.R. 892, (1991), 75 D.L.R. (4th) 577.

44. (1991), 71 Man. R. (2d) 252 (Man. C.A.).

45. See, however, *Canada Human Rights Commission v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, per McLachlin and Major JJ. dissenting in part.

46. *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.)

47. [1992] 1 S.C.R. 901. See also *Georgia Pacific Canada Inc.* v. *International Brotherhood of Boilermakers, No. D513*, [1999] A.J. No. 259 (Alta. Q.B.).

48. *Litterst* v. *Horrey* (1995), 32 Alta. L.R. 40 (C.A.), citing *Baxter Travenol Laboratories of Canada* v. *Cutter (Canada), (No. 2)* (1984), 14 D.L.R. (4th) 641 (S.C.C.).

49. *Merchants Consolidated Ltd. (Receiver of)* v. *Canstar Sports Group Inc.* (1994), 113 D.L.R. (4th) 505 (Man. C.A.).

50. *MacMillan Bloedel Ltd.* v. *Simpson*, [1996] 2 S.C.R. 1048 at 1060 (emphasis in original).

51. *Ibid.*, at 1064.

52. (1994), 154 A.R. 65 (Q.B.), at 69.

53. *E.F.S.* v. *P.D.L.* (1995), 171 A.R. 217 (Q.B.).

54. See *Pierre* v. *Roseau River Tribal Council*, [1993] 3 F.C. 756 (T.D.), citing *Bhatnager* v. *Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217, at 224.

55. *Vidéotron Ltée* v. *Industries Microlec Produits Electroniques Inc.*, [1992] 2 S.C.R. 1065. See also *A.F.* v. *P.O.*, [1996] A.Q. No. 1356 (C.S.).

56. *Pierre* v. *Roseau River Tribal Council*, [1993] 3 F.C. 756 (T.D.).

57. (1991) 31 R.F.L. (3d) 421 (B.C.S.C.).

58. (1991), 30 R.F.L. (3d) 197 (B.C.C.A.).

59. In *Poje* v. *A.G. for B.C.*, *supra*, note 12, Kellock, J. at 519 *et seq.* doubted the correctness of the dictum stated in *Seaward* v. *Patterson* (1897), 1 Ch. 545 that suggests there is a difference between a person bound by a court order who disobeys it and the position of a person not bound by the order who seeks to set it at naught. Kellock, J. concludes at p. 522 that "...a party and a non-party are on exactly the same footing so far as contempt of court is concerned".

60. *Supra* note 10.

61. Vol. VII, 2nd ed., at 2.

62. At 517.

63. At 522.

64. At 36.

65. *Supra* note 47.

66. *Ibid.* at 931.

67. *Ibid.* at 932.

68. *Ibid.* at 12.

69. See, e.g., *Slocan Forest Products Ltd.* v. *Tichenor*, [1998] B.C.J. No. 218 (B.C.S.C.)

70. (1991), 54 B.C.L.R. (2d) 273 (B.C.C.A.).

71. *Poje* v. *A.G. for B.C.*, *supra* note 10, at 527 where Kellock, J. said:

> In these circumstances, I think the order of the learned Chief Justice was properly made, and as the proceeding was a criminal proceeding...It follows that the rules of court are inapplicable as they apply only in civil proceedings.

In *B.C.G.E.U.* v. *A.G. of B.C.*, *supra* note 13, Dickson, C.J.C. at 237 cited *Poje* as authority for the following:

> Conduct designed to interfere with the proper administration of justice constitutes contempt of court which is said to be `criminal' in that it transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole ... It follows that McEachern C.J.S.C. and the British Columbia Court of Appeal correctly concluded that the picketing of the court-houses of British Columbia constituted a criminal contempt.

Care should be taken in considering a number of authorities which have held that failure to comply strictly with the Rules of Court is fatal. Such cases may be wrongly decided if the contempt was criminal. See *Poje*, *supra*, at 527.

72. See, *e.g.*, *Everywoman's Health Centre Society* v. *Bridges*, *supra* note 41.

73. In *R.* v. *Froese, supra*, note 8, approval is given to the form of Notice of Motion suggested by Lord Atkin in his *Encyclopedia of Court Forms and Precedents in Civil Cases* (1940) Vol. VII, p. 61, which seeks leave:

> ...(to) issue a Writ or Writs of Attachment against Russell Frose (*sic*) and British Columbia Television Broadcasting System Ltd., carrying on business as BCTV for their several contempts of this Court in television on Channel 8 Television in the City of Vancouver, and on repeater stations throughout the Province of British Columbia on the six o'clock news and the eleven o'clock news on Monday, the second day of October 1978 a news broadcast with the following oral commentary.

The notice of motion stated that the said relief was sought upon the following grounds (p. 199):

> ...that the publication of the said material, and particularly the reference to Robertson having been the subject of investigations involving drugs and stolen property, is calculated to interfere substantially with the fair trial of the above named accused, William Faulder Robertson, and the other above mentioned accused.

74. [1970] 1 All E.R. 1079, at 1081.

75. *R.* v. *K.(B).*, [1995] 4 S.C.R. 186.

76. See, *e.g.*, *R.* v. *Janvier*, unreported, Doc. Edm. 9603-0817-A5, (April 11, 1996) (Alta C.A.), where O'Leary J.A. held in a case in which an accused was observed by a provincial court judge to have made a threatening gesture toward him, that the better course, given that the accused was already in custody, would have been to deal with the matter other than through summary proceedings.

77. *Oswald on Contempt of Court*, 3rd ed., at 16; *In re Johnson* (1887), 57 L.J.Q.B. 1, at 3; *Re B.C.G.E.U.*, *supra*, note 2.

78. *Re Gerson*, [1946] S.C.R. 547.

79. *Supra*, notes 21, 22.

80. *R.* v. *Parke*, [1903] 2 K.B. 432, at 442-3. The procedure for criminal Information was a totally different and distinct process from our present initiating "Information" and has been abolished by our *Criminal Code* s. 576(2).

81. *Supra* note 9.

82. *Supra* note 18, at 156.

83. (1976), 34 C.R.N.S. 234 (Que. S.C.), aff'd (1976), 36 C.R.N.S. 296 (Qué. C.A.).

84. *Re Johnson* (1887), 20 Q.B.D. 68, at 74.

85. *Re Tilco Plastics Ltd.* v. *Skurjat et al.*, [1967] 1 C.C.C. 131 (Ont. H.C.), at 145, quoting from *R.* v. *Parke*, [1903] 2 K.B. 432 at 442-3.

86. "Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual" (1951), 30 *Canadian Bar Review* 225.

87. [1967] 1 C.C.C. 131, at 147 (Ont. H.C.).

88. *Supra* note 18, at 155.

89. *Supra* note 19.

90. [1974] 3 All E.R. 283 (C.A.).

91. Emphasis in S.C.C. decision: *R.* v. *K.(B.)*, [1995] 4 S.C.R. 186, at 194.

92. It is not necessary that the judge personally know every fact. He can, for example, accept statements of fact from counsel or from court officials about related matters which may have

occurred out of court. In cases where there is any doubt, the course of wisdom is to take evidence, and, where affidavits are tendered, there should be a right to cross-examine deponents if there is a question of doubt on a material fact.

93. [1995] 4 S.C.R. 186, at 195.

94. *Ibid.*, at 197.

95. *Ibid.*, at 197-8.

96. *Ibid.*, at 198.

97. No *Charter* challenge to summary proceedings was made in this case.

98. *Bhatnager* v. *Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217, at 225.

99. *354415 Alberta Ltd.* v. *Qureshi* (1992), 6 C.P.C. (3d) 284 (C.A.).

100. *Kin Franchising Ltd.* v. *Donco Ltd.* (1993), 7 Alta. L.R. (3d) 313 (C.A.); *Bhatnager* v. *Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217, at 226; *Pierre* v. *Roseau River Tribal Council*, [1993] 3 F.C. 756 (T.D.), at 769-70.

101. The preferable procedure, as stated previously, is to act decisively if it is necessary so to do, but to give the alleged contemnor a hearing with all due safeguards as soon as possible. In *R.* v. *Froese*, *supra* note 8, the alleged contempt occurred during the first few days of a trial that lasted nearly a year. Everyone agreed it should be put over to the end of the trial.

There will seldom be any reason to deal with a question of contempt instantly if the alleged contemnor wishes time either to get counsel or to consider his position or for any other reason. If the matter is serious enough, and the protection of the authority of the court requires decisive action, then having the accused taken into custody and fixing an early date for a hearing, perhaps later in the day, will usually suffice.

102. (1980), 25 Nfld. & P.E.I.R. 198 (Nfld. S.C.).

103. (1990), 48 C.R.R. 327 (Nfld. S.C.).

104. *Supra* note 8.

105. [1981] R.P. 80.

106. *Supra* note 10.

107. *Supra* note 18.

108. *Supra* note 83.

109. At 305.

110. *Supra* note 13.

111. *Supra* note 8.

112. *Supra* note 8.

113. *MacMillan Bloedel Ltd.* v. *Simpson* (1994), 11h D.L.R. (4th) 368 (B.C.C.A.), aff'd on other grounds [1995] 4 S.C.R. 725.

114. *R.* v. *Hawkins*, *supra* note 5. There are, however, cases which suggest an inferior tribunal is limited, even in contempt in the face of the court, to remedies specifically furnished by the *Criminal Code* such as to compel a witness to answer a proper question, *etc.* See *R.* v. *Bubley*, [1976] 6 W.W.R. 180 (Alta. C.A.); *R.* v. *McKenzie*, [1978] 4 W.W.R. 582 (Alta. C.A.).

115. In *R.* v. *Fotheringham* (1970), 73 W.W.R. 500 (B.C.S.C.) a journalist wrote a scathing denunciation of a Coroner and the Attorney General brought a Petition for contempt in the Supreme Court. The Petition was dismissed but the procedure was not questioned. See also *R.* v. *Davies*, *supra* note 15, and *Re B.C.G.E.U.*, *supra* note 13.

116. *Supra* note 47.

117. (1979), 2 S.C.R. 618.

118. *Ibid.* at 638.

119. (1991), 48 B.L.R. 125 (F.C.A.).

120. [1987] 2 S.C.R. 463, reversing (1985), 19 C.C.C. (3d) 434 (Alta. C.A.).

121. (1994), 97 Man. R. (2d) 20 (C.A.).

122. *Supra* note 117, at 629.

123. R.S.C. 1985, c. Y-1.

124. (1991), 54 B.C.L.R. (2d) 146 (B.C.S.C.), at 155.

125. (1994), 113 D.L.R. (4th) 368 (B.C.C.A.), aff'd [1995] 4 S.C.R. 725, at 753-4. In the companion case of *MacMillan Bloedel Ltd.* v. *Simpson*, *supra* note 50, McLachlin J., for the Court,

stated: "It is accepted by all that the British Columbia Supreme Court, as a court of inherent jurisdiction, possesses the power to maintain the rule of law."

126. In *Re Duncan*, [1958] S.C.R. 41, counsel made a completely unsubstantiated allegation of bias against one of the judges of the Supreme Court of Canada and was found guilty of contempt and fined.

127. *Supra* note 1.

128. (1980), 51 C.C.C. (2d) 369 (B.C.C.A.).

129. (1980), 4 W.W.R. 202 (Alta. C.A.).

130. [1984] R.D.J. 571 (Qué. C.A.).

131. At 577.

132. *Supra* note 13. See also *Bhatnager* v. *Minister of Employment and Immigration*, [1990] 2 S.C.R. 217, 71 D.L.R. (4th) 84, in which Sopinka J., speaking for the Court, held that personal service or actual personal knowledge of a court order is required by the common law as a precondition to liability in contempt. Service of the order on a solicitor may or may not lead to the inference of actual personal knowledge; in this case, given the circumstances, it did not. The Supreme Court did not expressly address the issue of *mens rea*.

133. *Supra* note 1.

134. At 234.

135. (1994), 97 Man. R. (2d) 20 (C.A.), citing *R.* v. *Jones* (1978), 42 C.C.C. (2d) 192 (Ont. C.A.); *R.* v. *Hill* (1976), 33 C.C.C. (2d) 60 (B.C.C.A.); *R.* v. *Swartz* (1977), 34 C.C.C. 477 (Man. C.A.).

136. (14 March 1990) (B.C.S.C.) [unreported].

137. *Supra* note 47, at 933. See also *Turney* v. *Turney*, [1997] B.C.J. No. 2542 (B.C.S.C.).

138. See, e.g., *R.* v. *Watson*, [1996] B.C.J. No. 733 (B.C.C.A.).

139. *Supra*, note 50, at 19-20. See also *Turney* v. *Turney*, [1997] B.C.J. No. 2542 (B.C.S.C.).

140. *MacMillan Bloedel Ltd.* v. *Simpson* (1994), 113 D.L.R. (4th) 368 (B.C.C.A.), at 381, aff'd on other grounds [1995] 4 S.C.R. 725.

141. *Supra* note 1, at 514.

142. *Supra* note 13.

143. *Supra* note 11.

144. At 213.

145. *R.* v. *K.(B.)*, [1995] 4 S.C.R. 186.

146. *R.* v. *Laurendeau* (1982), 3 C.C.C. (3d) 250.

147. (1984), 15 C.C.C. (3d) 150 (Ont. C.A.).

148. *Supra* note 13, at 246.

149. (1991), 63 C.C.C. (3d) 273 (B.C.C.A.), leave to appeal refused (1991), 64 C.C.C. (3d) vi.

150. *Supra*, note 3.

151. In *A.G. of Québec* v. *Hébert*. *supra* note 18, the alleged contemnor was refused the right to call some witnesses and he was required to show cause why he should not be found guilty of contempt.

152. In *R.* v. *Ouellet* (1976), 34 C.R.N.S. 234 (Qué. S.C.), aff'd. (1976), 36 C.R.N.S. 296 (Qué. C.A.), Mackay, J., the judge who initiated the proceedings, requested Hugessen, A.C.J. Qué. to hear the matter. In *R.* v. *Froese*, *supra* note 10, Berger, J., the trial judge, thought he may have made some comments about the respondents when the matter first arose which might be regarded as a prejudgment so he requested another judge to hear the matter. These are examples of the preferred procedure.

153. See *supra*, note 73.

154. [1992] 2 S.C.R. 1065.

155. At 170.

156. In *Layne* v. *Reed et al.* (1984), 14 C.C.C. (3d) 149 it was held that even if there is a *Charter* right to trial by jury for contempt the common law limitation of that right is reasonable under *Charter* s. 1.

157. (1994), 113 D.L.R. (4th) 368 (B.C.C.A.), aff'd on other grounds [1995] 4 S.C.R. 725.

158. *Supra* note 47.

159. (1990), 48 C.R.R. 327 (Nfld. S.C.).

160. See, *R.* v. *Clark*, [1997] B.C.J. No. 762 (B.C.S.C.).

161. *McKeown, supra*, note 14, furnishes a good example of why a judge should step aside. In that case the accused, a lawyer, failed to appear in court as scheduled. A serious question arose about whether he was ill. The judge, who initiated the proceedings, and who was unassisted by counsel, personally called and cross-examined some witnesses and decided the issue by inferences he drew from a telephone conversation he said he had with the lawyer, which the lawyer did not remember, in which the judge said the lawyer told him he wasn't feeling well and would be a little late. There was no doubt the lawyer was not well, probably from diabetes. There was a finding of intoxication although there was strong evidence to the contrary. The accuracy of the judge's recollection was questioned and the judge declined to submit to cross-examination. It was clearly a case where the judge should have stepped aside.

162. *R.* v. *Froese, supra*, note 8 was such a case.

163. *Supra* note 136.

164. (1991), 63 C.C.C. (3d) 273 (B.C.C.A.), leave to appeal refused (1991), 64 C.C.C. (3d) vi.

165. Mackay, J., whose decision was attacked in *Ouellet, supra*, note 152, wisely asked another judge to hear the matter.

166. *Supra* note 15, at 41.

167. *Supra* note 6.

168. *Supra* note 10.

169. See text at notes 24-47. See also the cases of *Hill* and *McKeown, supra*, note 6.

170. See *R.* v. *Froese, supra*, note 8, at 191.

171. *Dale* v. *Toronto R.W. Co.* (1915), 34 Ont. L.R. 104 *per* Riddell, J. at 108.

172. In one case an accused, having been found guilty of first degree murder, before sentencing thanked his counsel, said he didn't blame the jury, but said he thought the judge had as much class as an onion sandwich! In another case a judge sentenced a young lady to life imprisonment for a series of convictions for terrorist activities and she threw a tomato at him. In a third case a judge had to adjourn a date fixed for an accused being proceeded against as a Dangerous Offender because the trial judge was unable to be present and the accused stated that the kindly substitute judge was an idiot and he prefaced that noun with a number of coarse adjectival participles. In each case the judges just did what had to be done and walked off the bench. Sometimes persons shout epithets at judges as they are leaving the bench. Many experienced judges say the best course is just to keep walking. Two Alberta judges have shown great wit and presence. In one case an exasperated young counsel said something about the judge's wisdom which she should not have said. Pretending not to hear her the judge said, "I didn't hear what you said, Miss X, but I think we should adjourn", to

which she replied, "Good heavens, do you have that problem too?" The judge wisely left the bench. Another Alberta judge was called some unpleasant things by an angry accused to which the judge replied, "That was just a lucky guess on your part", and left the bench. Sir Robert Megarry in his *Miscellany I* at 295 refers to a female witness throwing a dead cat at a County Court judge. The judge observed, "I shall commit you for contempt if you do that again."

173. *Supra*, note 3, at 41.

174. *Supra*, note 18, at 156.

175. [1974] 3 All E.R. 283 (C.A.).

176. Emphasis in S.C.C. decision: *R.* v. *K.(B.)*, [1995] 4 S.C.R. 186, at 194.

177. [1945] A.C. 265 (P.C.).

178. *Supra* note 12.

179. *Supra* note 7.

180. *R.* v. *Fox* (1976), 30 C.C.C. (2d) 330 (Ont. C.A.); *R.* v. *Swartz* (1977), 34 C.C.C. (2d) 477 (Man. C.A.); *R.* v. *Barker* (1980), 53 C.C.C. (2d) 322 (Alta. C.A.); and *R.* v. *Pinx*, [1980] 1 W.W.R. 77 (Man. C.A.).

181. Some professional bodies refuse to discipline their members for professional discourtesy on the ground that they do not wish to act in circumstances where the court has not exercised its jurisdiction in contempt. This is a misconception because, for the reasons stated, much discourtesy does not amount to contempt, and judges are expected to resort to contempt only in aggravated circumstances.

182. (1991), 75 D.L.R. (4th) 556 (Ont. Uni. Fam. Ct.).

183. *Microwave Cablevision* v. *Harvard House* (1982), 132 D.L.R. (3d) 570, 37 B.C.L.R. 101 (B.C.C.A.); and *Vance* v. *Vance* (1984), 50 B.C.L.R. 373 (B.C.S.C.).

184. Such proceedings are often said to be conducted *strictissimi juris*: *Glazer* v. *Union Contractors Ltd.* (1960), 33 W.W.R. 145 (B.C.S.C.).

185. (1991), 94 Sask. R. 310 (Q.B.).

186. *International Forest Products* v. *Kern*, [2001] B.C.J. No. 135 (B.C.C.A.).

187. In *R.* v. *United Fishermen & Allied Workers Union et al.* (1968), 1 C.C.C. 199 a union and some of its officers conducted a ballot to determine whether they would obey a court order. The union was fined $25,000 and two officers were sentenced to imprisonment for one year. In some

recent labour cases unions have been fined up to $30,000 for serious public disobedience of court orders. A fine of $1 million was imposed for a flagrant breach of a court order committed for commercial purposes (1986) 11 C.P.R. (3d) 470 and fines of up to $400,000 were imposed upon a nurses union in Alberta for deliberate and prolonged breach of an injunction. See *United Nurses of Alberta* v. *Alberta (Attorney General)*, *supra* note 47.

188. *International Forest Products Ltd.* v. *Kern*, [2000] B.C.J. No. 2086 (B.C.C.A.).

189. *Health Care Corp. of St. John's* v. *Nfld. and Labrador Assn. of Public and Private Employees*, [2000] N.J. No. 344 (Nfld. S.C.T.D.).

190. *E.F.S.* v. *P.D.L.* (1995), 171 A.R. 217 (Q.B.).

191. *Health Care Corp. of St. John's* v. *Nfld. and Labrador Assn. of Public and Private Employees*, [2001] N.J. No. 17 9Nfld. S.C.T.D.).

192. *Supra* note 147.

193. (1973), 17 C.C.C. (2d) 411 (Qué. C.A.).

194. *Supra* note 152.

195. (1990), 64 D.L.R. (4th) 374 (Man. C.A.).

196. *Per* Lyons J.A. at 379. See also *Ontario (Attorney General)* v. *Paul Magder Furs Ltd.* (1992), 10 O.R. (3d) 46 (C.A.), in which Dubin C.J.O. stated (at 54-5):

> In this case for a period of over 11 years the appellant has exhibited a brazen disregard for the rule of law, has shown contempt for the orders of the superior trial court of this province and sought to make a mockery of the administration of justice. At the same time, it seeks to invoke the judicial process to suspend the operation of the very orders that it has defied for years. To stay the order of Chilcott J. [imposing fines for contempt] pending appeal would be to countenance that conduct and to bring the administration of justice into disrepute.

197. (1991), 29 R.F.L. (3d) 113 (B.C.C.A.).

198. (1990), 63 Man. R. (2d) 238 (Man. C.A.).

199. Unreported, Doc. Calgary 9201-20768, March 19, 1993, summarized at [1993] A.W.L.D. 2, Issue 20, May 14, 1993.